AMERICAN STATE TRIALS

A Collection of the Important and Interesting Criminal Trials which have taken place in the United States, from the beginning of our Government to the Present Day.

WITH NOTES AND ANNOTATIONS

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PREFACE TO VOLUME TEN

Though the trial of *Edward D. Worrell* (p. 1) is full of striking and interesting features, it is the great speeches to the jury, of Wright and Bay that entitles it to over 150 pages of this volume. And this suggests the question, how comes it that the speeches to the jury in great criminal trials are no longer given space in the columns of our daily newspapers or preserved to the public in some permanent form as soon as delivered? When Rufus Choate or Daniel Webster spoke in Massachusetts or Prentiss or Marshall in Kentucky or Wright in Missouri or Sampson or Brady in New York, they spoke not only to the crowd in the court-room but to the American public. Their orations appeared almost verbatim in the press and were later reported in pamphlet form and were as eagerly purchased in the book-stores as the best selling works of fiction are today. When, for example, Daniel Webster made his great speech for the Commonwealth on the trial of the Knapps for murder in the little town of Salem (see 7 Am. St. Tr.), not only did it appear in full in the local papers, but it was reported in book form in Massachusetts and in New York by at least half a dozen different publishers. And this continued to be the practice until about the close of the civil war. It still exists in England; a speech to the jury by a leader of the bar in an important criminal trial will appear the next day in the newspapers almost word for word. What is the reason for this neglect by our press of the oratory of our bar? Is it that commercialism has killed eloquence and that it has become extinct like the dodo? that our modern advocate has

lost that gift of public speaking in the court-room which so attracted the public a generation ago? It might be worth while for some student in our newly-founded schools of journalism to make a study of this question and to give us the reason why the oratory of the court-room is today practically ignored by the press of the United States.

When *John Hodges* (p. 163) was indicted for treason in the year 1815, he found that in the opinion of the presiding judge, Mr. Justice Duvall, of the Supreme Court of the United States, "Giving aid and comfort to the enemy" was a very comprehensive phrase. But the jury understood that he was no traitor and fortunately the jury had the last word.

The last act of the case of *Leo M. Frank* (p. 182) was the final scene in a Tragedy of Errors in which Justice was the real victim. The murder of a young factory girl caused a great sensation in the community and the people and newspapers jumped to the conclusion that Frank—a northern Jew and college graduate and the last person who had seen her alive—was the murderer and demanded that he should be hanged. But Frank had his friends, too, and soon what looked like an organized campaign in his behalf, was started in the Eastern States and kept up with unceasing vigor after his conviction and while his case was pending before the Appellate Courts and the Governor of Georgia. People thousands of miles away wrote letters to the newspapers and signed petitions in which they maintained that Frank was not guilty—men and women who had not seen or heard a single witness and who had nothing but hearsay on which to found their opinions. Very naturally the people of Georgia resented this interference with their courts and this out-

side meddling served only to increase their determination that Frank should suffer death.

Here Justice received its first wound. Every civilized nation has determined that the guilt or innocence of one accused of crime and the punishment to be meted out to the criminal shall be decided by regular Courts of Justice presided over by trained jurists, assisted in most of them by twelve laymen—called a jury. This is the best that civilization has been able so far to evolve. These tribunals may sometimes err whereby innocent men are sent to the gallows and guilty men are set free, for no human system is perfect. But the agitation in the Frank case was a protest against this historical and well-ordered method. It was a clamor that questions of guilt or innocence should be decided not by the established tribunals but by popular vote. It was a demand that those tribunals should solve the problem, not according to the opinions of its judges founded upon the evidence, but upon the views of the multitude, founded upon sentiment and rhetoric. It is perfectly clear that this is a denial and negation of all law and of all authority. It is simply Lynch Law, exaggerated and popularized. We cannot try issues of this kind in this way; we cannot decide the guilt or innocence of an accused man or woman by a show of hands in a town meeting or by counting noses on the street. And the people of no state in the American Union are going to acquiesce in this kind of proceeding. No citizen of one state is willing to submit to the inhabitants of the other states the question whether the decisions of its own tribunals are right or wrong and should or should not be enforced. And this is what happened in Georgia.

From the citizens of Atlanta, indignant at the

crime and anxious to punish the criminal, twelve men were chosen to try the issue of Frank's guilt. They were ordinary men, shop-keepers and clerks, without any special education to fit them to follow logically the arguments pro and con and with no training at all in weighing evidence. After listening to the witnesses and the speeches of counsel for many days, and aware every moment, from the conduct of the audience in the court-room, that local opinion was practically unanimous against Frank, the jury found him guilty and the judge sentenced him to be hanged. Then the condemned man appealed to the higher courts where he contended that he was innocent and asked that those who sat in the high tribunals—because they were presumed to have all those qualifications which the twelve jurors lacked—should examine the evidence and pass upon the question of his guilt or innocence of the crime with which he was charged. But to this appeal judge after judge turned a deaf ear. The trial judge told him that he had listened to all the witnesses for many days, but was not convinced that he was guilty, but the jury had found him guilty and that was enough for him.[1]

The six judges of the State Supreme Court listened twice to long arguments and wrote several very learned judgments, but they were devoted solely to

1 "Even after the jury had brought in its verdict, Judge L. S. Roan, the presiding judge, was not convinced of the defendant's guilt. In denying the motion for a new trial he made this remarkable statement: 'I have given this question long consideration. It has given me more concern than any other case I was ever in and I want to say here, that, although I heard the evidence and the arguments during these thirty days, I do not know this morning whether Leo Frank is innocent or guilty. But I was not the one to be convinced. The jury was convinced and I must approve the verdict and overrule the motion.'" Interview with Herbert Haas, one of the prisoner's counsel in the New York *Times*, March 2, 1914.

the question as to whether the judicial machinery had been run properly, whether any inadmissible evidence had been admitted, whether the jury had heard the cheers given to the prosecuting attorney by the crowd in the streets and so forth. And when finally the prisoner's lawyers were able to get the case before the most august tribunal in the world—the Supreme Court of the United States—that great Court forgot entirely the vital question of the guilt of the prisoner; the energy of its nine justices was expended on the question, should or should not the verdict of the jury be set aside because the counsel and judge had agreed that Frank should not be in court when the jury returned their verdict, and in accordance with this agreement he was in his cell in the jail at that time and received the news of it there instead of in court. And on this question, while the judges differed, a majority of them decided that it did not matter.

Here Justice received its second wound. The Supreme Court of the state learned that the trial judge was doubtful as to Frank's guilt, but it learned it in the wrong way. The trial judge expressed his doubt in the bill of exceptions, but failed to do so in his order, overruling the motion for a new trial. "Had he taken the latter mode of informing the Court of his doubt, the Supreme Court would certainly have granted a new trial. But since it was not put in that order under a technical rule of practice which is unbending in our Supreme Court, a new trial was denied, not because the doubt of the judge did not exist (for he certified to that himself in the bill of exceptions), but because he did not express that doubt in his written order rather than in the bill of exceptions."[2]

[2] 49 Am. Law Rev. 947.

Just think of this, O! shades of Bentham and Brougham, who more than half a century ago helped to wipe out these absurdities from the old English Procedure which, the work of churchmen in the middle ages, had lived unto the nineteenth century. Is there any other part of the civilized or uncivilized world where such things as Courts of Justice are known, that such a condition of things exists, outside of some of the American states? A man's life or liberty, the question of his guilt or innocence, depend not upon the evidence or upon the idea of justice, but upon whether or not somebody has put the necessary thing in the right document or in the wrong one. The people of Georgia, in establishing their Supreme Court, must have believed they were creating a high tribunal, where beyond the prejudice of particular localities, a convicted man would have justice administered in its highest form. Who made this limit to the court's jurisdiction? Did the people ever demand that the court should shut its eyes to what it could see and its ears to what it could hear? Or was it not the court itself which made this rule which denies justice unless it is asked in a particular form?

And the Supreme Court of the United States had not a word to say on the only question that either the prisoner or the people of the state cared a rap about, viz.: did Leo M. Frank murder Mary Phagan? Whether Frank was in the court-room when the verdict was returned had as little to do with the fairness of the trial or of his guilt, as would the question whether he wore a black or a grey coat or a red or a blue tie when the witnesses were examined and his counsel addressed the jury.[3]

[3] In Continental practice the prisoner is excluded from the room when the jury announce their verdict. The editor inquired of a

When will our appellate judges recognize that their duty is to do justice, not simply to see that the judicial machine is run according to rule? When will our tribunals arrive at that very different point of view of the English and Continental Courts? Not so long as in American courts, Procedure is King; for while the claims of this tyrant are respected, it matters not what may become of Justice.

Frank now made his last appeal to the Governor of the state in whom is vested the ancient prerogative of the King—the power to pardon one unjustly convicted or to mitigate a punishment which he finds too severe. And the Governor of Georgia, after a patient and exhaustive examination of all the evidence, was of opinion that there was a reasonable doubt of his guilt and that the jury had made a grievous mistake in convicting him. And it will be difficult to find an unprejudiced reader of the evidence as set out in this volume who will not agree with him. Conley's story seems a pure fabrication. Frank could not have committed the crime and disposed of the body in the time alleged by the negro; it is utterly inconceivable that the notes found near the body could have been dictated by a man of Frank's education; the Saturday afternoon was spent by him in making up a complicated financial sheet requiring hours of time, and Conley admitted he was so drunk on that day that he did not know where he was or what he did. The Gov-

Paris judge why this was so, and he replied it was on humanitarian grounds, to spare the feelings of the prisoner. And whoever has watched a man on trial for his life in an American court room and has seen the awful strain the prisoner is under while the jury is filing into court and the judge is preparing to put the question to them as to what their verdict is, will appreciate the delicacy of the French point of view, which thinks it more kind to convey the result through his friends or lawyers in the quiet of the prison.

ernor, however, did not set Frank free. He sentenced him to imprisonment for life. But if Frank murdered Mary Phagan was there one extenuating reason why he should escape the gallows? the evidence shows none; his friends, his counsel, he himself never suggested one. If, as may be the case, the Governor's intention was to keep him in prison until the public excitement had gone down and he could be safely released, then the state of Georgia was pledged to protect him against the mob. And when it was not strong enough to do this, Justice received its final wound and lay stricken to death.

The causes of the "Boston Massacre" which led to the trial of the British Soldiers, *Weems and seven others* (p. 415), *Captain Preston* (p. 509), and *Edward Manwaring and others* (p. 511) are set out in the narrative (p. 415.)

The funeral solemnities of those who were killed by the fire of the soldiers were conducted with great pomp and splendor. Crispus Attucks, a mulatto, and James Caldwell, who were strangers in Boston, were borne from Faneuil Hall, Samuel Maverick, a youth of seventeen, from his mother's house in Union Street and Samuel Gray from his brother's in Royal Exchange Lane. The other, Patrick Carr, was still alive, although mortally wounded and died a few days afterwards. The four hearses formed a junction in King Street at the place where the deceased fell and thence an immense procession marched in columns of six deep through the main street to the central (Granary) burying ground where the four bodies were deposited in one tomb, amidst the solemn tolling of all the bells in Boston and the neighboring towns.

As might be expected, this tragedy wrought the whole people of Massachusetts, and above all, the inhabitants of Boston, to the highest pitch of rage and indignation. The populace breathed only vengeance. Even minds better instructed and of higher principles than the multitude, in the excitement of the moment could not endure the doctrine that it was possible for an armed soldiery to fire upon and kill unarmed citizens and commit a crime less than murder. Political animosity and natural antipathy to troops stationed in the metropolis sharpened this vindictive spirit. The friends of the government were either silent or only expressed regret and lamentation at the event. The friends of freedom were loud in their indignation and clamorous for that justice which declares that blood shall be the penalty of blood.

Meanwhile there had been several meetings of the people and a committee was appointed which proceeded to the examination of witnesses "in order to show to the world and especially to the friends of the colonies in England that there were just grounds for insisting upon the removal of the troops." A narrative was also given of the transaction which was adopted by the town and was widely distributed, differing materially from the facts as subsequently proved and calculated to increase the excitement. Under such circumstances the British soldiers were to be tried for their lives and serious fears were entertained, not only by their friends but by the candid and moderate of all parties, that they would not be dealt with by even-handed justice.

But among the friends of freedom there were men who viewed this matter in the calm and rational light of truth and justice. Anxious for the honor of the

town, doubly anxious for the cause of humanity they felt an earnest desire that justice should not fall a sacrifice in her own temple. Of these John Adams and Josiah Quincy, junior, deserve most honorable mention. Sympathizing most deeply with the mass of their fellow-citizens in their hatred of the instruments of their oppressors, and in their detestation of the principles they had been sent hither to maintain, no men had more openly or pathetically appealed to their fellow-citizens or had more studiously excited their resentment both in the gazettes and in Faneuil Hall against the troops and their employers. What, then, must have been their surprise when Captain Preston solicited their professional services in his own behalf and in that of the soldiers. To understand the difficulty of their situation it is necessary to realize the exasperated state of public feeling. The spirit of revenge glowed with a fervor almost universal. On the one hand were the obligations of humanity, official duty and the strong desire that justice should be done; on the other the confidence of their political friends, their popularity and that general affection which their public course had attained for them in so remarkable a degree among their fellow-citizens, were to be hazarded. After deliberation and consultation with each other and their friends, both of these patriots yielded all personal considerations to the higher obligations of humanity and official duty. They braved the fury of the moment and interposed their learning, talents and well earned influence to that torrent of passion which for a time threatened to bear down the landmarks of justice.

In the midst of an excitement unparalleled in the history of our country and in a community where they

were regarded with abhorrence that they were only saved from summary punishment by the judicious efforts of the friends of law and order, the soldiers had a fair trial, the result of which has stood the test of time and the examination of impartial history.

The result of the trial gained for the friends of freedom the respect of the world and no single occurrence did more to advance the cause of truth and just principles than what was dominated in the language of that day the Boston Massacre. It caused the immediate withdrawal of the troops from the town of Boston and the people, feeling that something had been gained, received new confidence in the determination to resist the encroachments of arbitrary power and mistaken policy. It was determined by the town to celebrate the anniversary of the fifth of March, to the end that there might be an annual development of the "fatal effects of the policy of standing armies and the natural tendency of quartering regular troops in populous cities in times of peace." On the day of the first celebration the bells of the town of Boston were tolled from twelve to one o'clock, at noon, and from nine to ten in the evening and during this, figures to represent the murder of the inhabitants were exhibited from a window of a distinguished citizen of the town. On the recurrence of this anniversary until after the independence of the country was firmly established, the day was always observed in a solemn and striking manner. An oration was delivered by public request, when the orators took occasion to illustrate and enforce the great principles of civil and religious liberty, and the people of Boston were thus prepared for those acts of spirited and determined resistance to the encroachments of the Crown which placed them

in the foremost rank of the patriots of that day and covered the names of some of their number with imperishable fame.[4]

That curious ancient privilege, viz.: benefit of clergy, of which the two soldiers (*Killroy* and *Montgomery*) convicted of manslaughter, had the advantage (p. 508) originated in a pious regard for the church by which the clergy of Catholic countries were either partially or wholly exempted from the jurisdiction of the ordinary legal tribunals. It extended in England only to the case of felony; and though it was intended to apply simply to clerical persons or clerks, yet as being able to read was, by the laws of England, considered as sufficient evidence of the clerical character, when the rudiments of learning came to be diffused, almost every man in the community became entitled to this privilege; a person entitled to the benefit of clergy was formerly handed over to the ecclesiastical tribunals for trial. But this giving rise to great abuses the secular judges ordered those who were entitled to the benefit of clergy to be detained in prison until they should be pardoned by the king. By a statute passed in the reign of Queen Elizabeth, persons convicted of felony and entitled to the benefit of clergy were to be discharged from prison, being first branded in the thumb; if laymen it was discretionary with the judge to detain them in prison, not exceeding one year. At the time of the trial of the British soldiers, manslaughter was within the benefit of clergy and the punishment was for the offender to be burnt in the hand and forfeit all his goods and chattels. It was abolished in England in the reign of George IV.

[4] Chandler's American Criminal Trials.

The Leisler rebellion in New York (*Jacob Leisler*, p. 512) was the outgrowth of the anti-Catholic wave that swept over England and her colonies during the reign of James II, and Leisler's imagination greatly magnified the danger of a general religious war. He was no traitor to William of Orange; his effort was to hold the government for the Protestant cause. But he possessed none of the qualities of a leader—a simple New York merchant, his education did not fit him for the trying emergencies in which he was placed. He was wrong in seizing the government and this act made him many enemies, but his intentions were good, and his execution after the danger was passed was a judicial mistake. He perished a victim to party malignity. The first to raise the standard of William and Mary he was the first to suffer as a traitor. In later years his estate was restored to his family and an act of Parliament reversed his attainder. His violence and incompetency were forgotten in sympathy for the injustice of his death, and his friends became a successful party and one of his principal enemies was himself condemned as a rebel and a traitor.

The trial of *Nicholas Bayard* (p. 518) for High Treason in 1702, appropriately follows Jacob Leisler's case in 1691. They explain each other and are both singularly illustrative of the condition of the Province at the periods when they occurred, distracted as it was by two rival factions who carried their dissentions to an excess which has no parallel in this country. The account is derived from standard historical works and from a full report of the trial which appears to have been prepared by Bayard himself or some of his friends and which is contained in the fourteenth volume of Howell's State Trials. There

is no reason to doubt the general accuracy of that report although some of the statements in it should be received with much allowance. The trial as reported gives evidence of great learning, research and skill on the part of the prisoner's counsel, but some of the discussions which relate to mere questions of abstract law are here omitted.[5]

Judge Gerard, American Ambassador at Berlin from 1913 to 1917, is quoted as saying that it will be hard to find a punishment to fit the case of the kaiser and his pals who have been convicted in the Court of the World of the greatest crime in history. Perhaps the ancient sentence for High Treason which was passed upon Colonel Bayard (p. 539) might well be revived for their benefit, until something better is thought of.

For what small gain a man will commit murder, the trial of *Orrin DeWolf* (p. 540) shows. His victim was of even less value to society than he; and for this reason the Governor's Council thought he was not worth hanging. The case is reported here, not for its importance as a contribution to criminology, but to preserve the charge (which would otherwise be lost) of Massachusetts' great Chief Justice, Lemuel Shaw.

The case of the black coachman, *Alexander Whistelo* (p. 567) is a companion one to that of Maurice v. Judd where the grave question submitted to the same court was Is a whale a fish? See 3 Am. St. Tr. A more amusing trial is not to be found in the Judicial reports and again we meet our old friend Counselor Sampson[6] of New York, and with him again that great expert and fountain of knowledge, Dr. Mitchill.[7] The

[5] 2 Chandler's American Trials.
[6] 3 Am. St. Tr., 627.
[7] *Id.*, 613.

learned gentleman who had then contended that a whale under no circumstances was entitled to be called a fish was now no more successful in his view that a negro might be the father of a white child.

In passing the death sentence on *Robert McConaghy* (p. 601) the judge told him that for barbarity, treachery and depravity, his cruelty and wickedness had not been surpassed by the pirates of the West Indies or the savages of the wilderness. For on a summer day on a little farm, in Pennsylvania, he had murdered the whole Brown family, except the husband who was at the time away from home. George, aged 16, and David, aged 10, he had choked to death in the woods. Jacob of 14 years he had shot in the back; little Elizabeth, the only daughter, he had strangled, and then the mother's throat he had cut while she lay in bed and the eldest son John he had shot. The case finds no parallel in our criminal records. The pirates of the West Indies have long ago disappeared from the high seas, and the savages of the wilderness are no more. Only in the reports of the Bryce Commission on the Belgian invasion and in the report of the French government on the German atrocities in northern France, can one read of more awful crimes in scores of hamlets and country-sides in these devastated lands by a people who claim to be civilized and "cultured."

How many of our best citizens are every year paying tribute to adventurers like *W. J. Cook* (p. 624) and *Mrs. Hirsch* (p. 655) it would be difficult to say. The innocent victim, in nine cases out of ten, submits to blackmail rather than endure the publicity of the yellow press and the condition of mind of the ordinary American juror who will take any woman's word as against a man's. And our state legislatures who seem

to be sublimely ignorant of what the great dramatist has written of the comparative value of one's purse and good name, treat a blackmailer as a person to be dealt with most tenderly—witness the mild sentences given to Cook and Mrs. Hirsch. And our national legislature has made it still easier for this class of blackmailers by enacting a law under which, as construed by our highest Court, a notorious prostitute who induces a boy of 17 to pay her fare on a steamboat or railroad or street car, may, if the youth refuses to accede to her demands, actually pose in the courts as a White Slave and have him sent to the penitentiary for a longer term than the average sentence of a burglar, a foot-pad or an assassin.

The six Spanish pirates who were hanged in the city of Boston (*Pedro Gibert and others,* p. 699) had stopped on the high seas an American merchant vessel and had appropriated all the specie they found there. But the merchantman returned safely to its home port and no man or woman or child lost his life. What a trifling offense was this compared to the crimes of German pirates who have in the past four years sent to the bottom of the sea hundreds of peaceful vessels and murdered thousands of innocent sailors, passengers, women and little children. Tried for their lives by the admiralty law Gibert and his associates had no defense; and when after the war the German pirates are tried by the rules of International law what defense will they be able to set up? International law is simply the unwritten and written law of the nations. It is the sum of those usages which civilized people have decided to be binding on them in their intercourse one with another; and it has its rules for times of war as well as for times of peace. Just as the common law in England and America is

to be found in the customs of their people, in the writings of their jurists and in the decisions of their courts, so the unwritten International law is to be found in the customs of nations, in the works of International writers from Grotius down and in the decisions of civil, criminal and prize courts. And just as these principles have in the case of private law been written in statutes, so in the case of International law have they been embodied in treaties and in the declarations of International Congresses. Both private and international law justify the taking of human life in certain cases, but the submarine pirate will find no law to cover his murder of non-combatants. He will have but the plea that he was following the orders of a superman named the kaiser who is bound by no law human or divine and whose authority and will no living creature may deny or oppose. But will mankind bow to this?

As Dr. Wharton has put it, the conviction of *Dr. Cooper* (p. 774) after those that had gone before under the unpopular Sedition Law only added fresh pungency to invectives already pungent. Cooper shook his chains in the President's face and dared him to pardon him; and Lyon danced about his dungeon in agony, lest in a fit of clemency Mr. Adams should secure the presidential vote of Vermont. Under the Sedition Law the "seditious" became still more scurrilous; and the result was that the government found itself impudently bullied by those it attempted to chastise. It was reserved for later times to demonstrate that after all a press the most unfettered is a press the most restrained.

In a recent work of great interest to the lawyer[8]

[8] Decisive Battles of the Law, by Frederick Trevor Hill, New York and London, Harper Bros., publishers. 1907.

there is a striking picture of the personages—lawyers and judges—who clashed so strongly in the celebrated trial of *James Thompson Callender* (p. 813).

It was a picturesque gathering of Virginians that awaited the opening of the United States Circuit Court on that summer morning, for the ugly fashions of the French Revolution had not as yet found much favor in the Old Dominion, and knee-breeches, low shoes, buckles, buttons and queues tied with ribbons, were still in vogue. And yet it was not their dress but their faces and bearing which particularly distinguished these gentlemen as they stood talking with another under the wide-spreading trees at the edge of the public square. Many of them were clothed like English farmers, but they wore their dusty garments with an unmistakable air of distinction, and their clean-shaven, clear-cut features bespoke dignity and intelligence. The center of one group was especially noticeable, his strong and somewhat stern face indicating character in every line and the ease with which he held his auditors singled him out as a master of men. This was John Marshall, diplomat and jurist and soon to become the official chief of the hated Judge whose official program was summoning all the country-side. In another group near Marshall stood a handsome, neatly-dressed man about thirty years of age, tall, well formed and graceful, with a hearty laugh and a confident manner that seemed to fascinate those about him, particularly one keen, boyish-looking listener who hung upon his every word, for William Wirt was already the beau-ideal of the junior bar, and Philip Nicholas had reason to felicitate himself on being associated with such a rising young advocate. In this same group stood George Hay, soon to become one of the best known lawyers in the country, and beside him stood the distinguished leader of the Virginia bar, Edmund Randolph.

All these men were to meet again under very different conditions to conduct one of the most famous trials in American history,[9] but for the time being all professional and political differences were merged in their loyalty to the Virginia bar whose dignity and influence bade fair to be seriously affected in the trial of James Thompson Callender for seditious libel against the President of the United States.

That this was the first law passed by the national legislature against the freedom of the press and that its enforcement in Virginia threatened to provoke a conflict between the state and the Federal authorities, possibly involving the stability of the union, was quite sufficient to arouse unprecedented interest in Callender's case, for these facts indicated a cause of vital importance which bade fair to result in the first State trial upon record in the Common-

[9] Impeachment of Judge Samuel Chase, 11 Am. St. Trials.

wealth. Nevertheless, it was not these momentous issues that attracted the majority of the legal profession, but rather the personality of the judge who proposed to try the case, for His Honor was probably the most violent, the most feared and the best-hated partisan who ever sat upon the Federal bench.

Then follows this account of Judge Samuel Chase:

It was not in his judicial capacity alone that Samuel Chase had earned his reputation. In the stirring days preceding the Revolution he had been one of the "Sons of Liberty" who had attacked the public offices of Baltimore during the Stamp Act and later he and his band had actually compelled a group of old malcontents, including his own father, to take the oath of allegiance to the Continental Congress. Nor were these the only manifestations of such playfulness credited to his account, for when certain Pennsylvania Quakers had refused to illuminate their houses in honor of a Revolutionary success, he had swooped upon the offending citizens with his followers, bundled them into carts and deported them in the depth of winter to Virginia, where they were unceremoniously deposited and left to shift for themselves.

All this youthful boisterousness, however, would probably have been attributed to exuberant vitality and misdirected zeal had not his conduct as a member of the Maryland Colonial Legislature and the Continental Congress been almost equally turbulent and provocative of riot. The man was, however, an incorrigible bully, with a genius for offense and when at the close of the war he found himself a member of the Maryland House of Delegates, he straightway became involved in political broils which resulted in an attempt at his impeachment. But here his fighting qualities stood him in good stead, for he not only fought his enemies to a standstill, but he had himself rewarded, first with the Chief-Justiceship of the Criminal Court of Baltimore, and then with the Chief-Justiceship of the General Court, both of which offices he tenaciously held and administered in flagrant defiance of the law until his action was officially declared unconstiutional. Nevertheless, his name was writ large in the Declaration of Independence, his personal honesty, courage and patriotism were unquestioned, and although he had at first opposed the Constitution he had become in course of time the most ardent of Federal enthusiasts.

Such was the man whom Washington had appointed to the Federal bench in 1796 and there was to be nothing in his conduct of that office to belie his previous record. Domineering, fearless, vain, confident and honest, he had many of the qualities necessary to establish the authority of the new court, but no one did more than he to make his tribunal obnoxious to the bar. With a good classical

education and considerable experience and ability as a lawyer he had the majority of the attorneys who practiced before him at a distinct advantage, and those whom he could not unhorse with legal learning he cowed and silenced with jocular or brutal tyranny, as best suited his humor. But perhaps his gravest offense was political activity with which he never allowed his judicial duties to interfere, and he had not been long upon the circuit before angry outcries were raised against his aggressive Federal partisanship. Opposition of this character, however, merely excited his belligerency, and he never made the slightest effort to conceal his political opinions, either on or off the bench. Indeed, when the Sedition Act became a law, he had openly rejoiced at the opportunity it afforded for silencing critics of the administration and his actions were soon to speak louder than words. During the trial of Fries,[10] his arbitrary rulings practically forced the prisoner's counsel to retire from the case in disgust, and when Thomas Cooper, member of the Pennsylvania bar, convicted of libeling the President, was arraigned for sentence, he announced in open court that if he could discover that the Democratic party was behind the prisoner, he would inflict the severest penalties known to the law.[11]

Then we have a description of the people and the bar assembling at the old court house to hear and take part in the trial.

The threatened clash between the bench and bar was of course particularly interesting to lawyers, but there were many laymen among those gathered before the courthouse on the morning of the trial, for the country was thoroughly aroused over the attempt to enforce the Sedition Law within a state whose legislature had officially condemned it, and the conflict between the Federal and State authorities was far more important to the average Virginian than the settlement of any professional differences. Not all the horsemen who came trailing across the Common were present from choice, however, for the marshal had invaded the most distant plantations in his search for jurors and some of the victims had ridden ten, fifteen and even twenty miles in obedience to his summons, spreading the news of the impending event through the outlying districts, until the rapidly gathering crowd promised to surpass that of any previous court day in Richmond. Nevertheless, no one of the waiting throng seemed to be in any haste to move in-doors, and jurors, witnesses, spectators and laywers remained clustered about the entrance or scattered along the edge of the Common discussing

[10] See 11 Am. St. Tr.

[11] *Post*, p. 774.

the case until nearly ten o'clock, when they slowly moved towards the scene of action, and a few minutes later filled the courtroom to overflowing.

At a table beside the judicial desk sat William Marshall, clerk of the court and brother of the future Chief-Justice, and near him stood Mr. Nelson, the District Attorney, with David Robertson the shorthand reporter, whose notes were to prove an invaluable exhibit in the subsequent impeachment of the judge. The attention of the audience, however, was mainly directed to the prisoner, his bondsman, Meriwether Jones and his counsel, Messrs, Hay, Wirt and Nicholas, a formidable array for any hostile judge, and a trio with whom the bar of Richmond were well content to trust their dignity and honor. Indeed, these champions had already given Chase a taste of their quality by virtually forcing him to grant adjournments on two previous occasions, and it was whispered that they intended to manoeuvre him out of the case altogether by continuing their dilatory tactics until the term expired. In fact the word passed from lip to lip across the crowded chamber that the judge had walked into a very neat trap at the last hearing by granting an adjournment to procure the attendance of a certain witness named Giles. This, it was claimed, was a fatal concession, for if the non-appearance of this witness justified a postponement on Monday, it equally demanded it on Tuesday, for he was still missing, and the case could not, therefore, be tried until he was produced, which would be the day after never. The audience chuckled approvingly as this story went the rounds, gleefully anticipating the discomfiture of the judge, and the general opinion was that, for once, at least, Chase had met his match—a result particularly agreeable to local pride. Judicial tyrants might bully and awe the Pennsylvania or Maryland bar, but the profession in Virginia knew a trick or two which would—

Now enter the judges;

The chatter and laughter suddenly ceased as the door opened, disclosing the not too heroic figure of the District Judge, Cyrus Griffin, a rather futile, colorless and timid personage who appeared to be propelled into the room by a burly, bustling, red-faced man who strode rapidly to the bench, nodding an ungracious salutation at the assemblage, while the court crier bellowed his familiar announcement. The individual whose arrival had had the effect of a schoolmaster entering a noisy classroom, was a man of about sixty years of age, huge of bulk, coarse of feature, masterful in manner. On his massive head sat an ill-made wig and his garments were those of the ordinary citizen with no particular regard for appearances, but there was no mistaking his authoritative bearing as he loomed up behind the judicial desk and glowered at the silent audience. To

most of those who returned his scrutiny he was an entire stranger, for until the present term of the court he had never set foot in Richmond, and doubtless many of the spectators were prepared to find him a fiend in human shape. But though his expression was somewhat forbidding, his large, strong, clean-shaven face was not uncomely, and his giant frame suggested strength rather than brutality. Nevertheless his small, snappy, shifty eyes had a dangerous glint and there were ominous lines about the corners of his mouth, betraying possibilities of an ugly droop and other indications of a quarrelsome disposition were not wanting. The whole aspect of the man, however, suggested energy and determination rather than intellectual power, and contrasted with the group of lawyers who faced him, he appeared at a disadvantage. But the moment the proceedings opened this impression faded and as he leaned over the desk and listened to Mr. Hay's long and not too ingenious plea for an adjournment, his gaze was so uncomfortably intelligent that the speaker, obviously embarrassed, made poor work of his argument.

The trial of Judge Samuel Chase before the Senate of the United States—the first impeachment case reported in this series—for his unfair and partisan rulings and conduct, in the Callender and other trials, will be found in Vol. XI American State Trials.

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THE TRIAL OF EDWARD D. WORRELL FOR THE MURDER OF BASIL H. GORDON, UNION, MISSOURI, 1857.

THE NARRATIVE.

Edward D. Worrell was the only child of Dr. Edward Worrell of Dover, Del., a college president. He was well educated and after practicing dentistry for a while had enlisted in the army and in 1855 was stationed at Fort Leavenworth, as a sergeant. He deserted in company with William H. Bruff of Macon, Ga., in the early part of January, 1856, and started east on horseback. While traveling through Warren County, Mo., they fell in with Basil H. Gordon, a civil engineer, who was assisting in locating the North Missouri Railroad. On this trip, however, Gordon had been out on the proposed line collecting money that had been subscribed as a bonus to the road. The three men slept the night of January 24, 1856, at a tavern in Warren County and there Worrell and Bruff learned that Gordon had a large amount of money with him. The next day it snowed hard. As Gordon did not return to the railroad offices at St. Louis, the president of the road sent a searching party to hunt for him. They soon learned that the three men had left the tavern together on the morning of January 25, and that Worrell some time afterwards was seen to come out of a hazel thicket a short distance from the tavern, riding a horse and leading another, which satisfied his friends that Gordon had been murdered in the thicket.

Several days were spent searching for the body and the party had begun to despair of finding it when one of the searchers noticed a small dog scratching in the snow, and

VIRGIL GRENNAN

going to the place, found blood all over the snow, which continued to a ravine about fifteen feet from the road. Here they found Gordon's body, covered with brush and snow, a hole through the head as if made by a large pistol ball; his pockets turned inside out and his watch and all his money gone.

Worrell had been seen in St. Charles leading a horse which resembled Gordon's, and from there he went to St. Louis, remaining there three days and going to the theater each night. From there he traveled on horseback to Vincennes, Ind.

A published description of the deserter from Fort Leavenworth corresponded with that of the man who was seen with the horse in St. Charles, and the chief of police of St. Louis, Captain J. D. Couzins, started for Vincennes in pursuit of him and there learned that he had sold Gordon's horse and other articles belonging to the murdered man to the proprietor of a hotel in that place.

From this point, all trace of the murderer was lost for several days, but Captain Couzins finally traced him to Baltimore and from there to Dover, Del., where his parents resided. Captain Couzins saw him on the streets during the daytime, but feared that he would be taken from him by force by his friends. So he waited until after midnight and then arrested him in bed at a hotel, gagged him so that he could not give an alarm and took him twelve miles on a hand car, where he caught a train for the West. On a chair near Worrell's bed the saddlebags were found and in his pocket Gordon's watch. Bruff was taken into custody about the same time at his home in Macon, Ga.

Both Worrell and Bruff were indicted for the murder of Gordon in Warren County, Mo., in May, 1856, but the case was removed to the town of Union in Franklin County, and in January, 1857, a few days less than a year after the tragedy, the trial of Worrell was begun. After a hearing which lasted two weeks, the jury declared him guilty and he was hanged in June, 1857, his counsel having made a fruitless appeal to the Supreme Court.

THE TRIAL.[1]

In the Circuit Court of Franklin County, Union, Missouri, January, 1857.

HON. JOHN H. STONE,[2] *Judge.*

Edward D. Worrell had at the May Term, 1856, of the Circuit Court of Warren County been indicted jointly with *William H. Bruff* for the murder of Basil H. Gordon.[3] On

[1] *Bibliography.* "The Law of Circumstantial Evidence and of Insanity. A Report in full of the trial of Edward D. Worrell, indicted for the murder of Basil H. Gorden, held at the court house in Union, Franklin County, Missouri, January 19, 1857. Reported by John Delafield, Esq., St. Louis, Mo. M. Niedner, Publisher. St. Louis, Mo., 1857."

[2] STONE, JOHN H. A native of Tennessee, but was educated near Georgetown, Ky., to which place his parents had removed; was not a college graduate, but read Latin with facility and had a knowledge of Greek. Was a student at the Law School at Lexington; came to Missouri in 1836 and settled at Fulton, Callaway Co., where he practiced law until appointed Judge of the 9th Judicial Circuit in 1843, residing at Potosi. "He remained on the bench until some time in the early part of the war when he fell a victim to that turbulent spirit which reigned throughout the State. . . . He was arrested upon a charge of disloyalty and thrown into the Gratiot St. prison, at St. Louis. The real motive was to prevent him holding court in one or two counties in which large amounts of property were advertised to be sold under execution. . . . His friends obtained his release; he went back to Callaway County and finally settled at St. Charles. . . . The effect of the war and the personal ill treatment to which he was subjected hurried him rapidly to the grave. He must have died shortly after the close of the war. A more upright, conscientious and honest man never lived." Bay (W. V. N.), "Bench and Bar of Mo.," p. 373.

[3] The Grand Jurors for the State of Missouri empanelled, sworn, and charged to enquire in, and for the body of the County of Warren, on their oaths present that Edward D. Worrell and William H. Bruff, on the twenty-fifth day of January, in the year of our Lord one thousand eight hundred and fifty-six, at the County of Warren, aforesaid, with force and arms in and upon one Basil H. Gordon, then and there feloniously, wilfully, deliberately, premeditatedly and of their malice aforethought, did make an assault, and that the said Edward D. Worrell, a certain pistol there and then charged with gunpowder and a leaden bullet, which said pistol he, the said Edward D. Worrell, in his right hand then and there

May 6 they had appealed to that court for a change of venue on the ground that the "inhabitants of this entire judicial circuit are so prejudiced against these defendants that a fair trial cannot be had in the same," which application was granted and the indictments transferred to the Franklin Circuit Court and the prisoners delivered to the sheriff of Franklin County, and at the September term of the Franklin Circuit Court the case was continued to a special term of the court to be held in January, 1857.

had and held at and against the said Basil H. Gordon, then and there feloniously, wilfully, deliberately and premeditatedly, and of his malice aforethought did shoot off and discharge, and that the said Edward D. Worrell, with the leaden bullet aforesaid, by means of shooting off and discharging the said pistol so loaded, to, at and against the said Basil H. Gordon as aforesaid did, then and there feloniously, wilfully, deliberately, premeditatedly, and of his malice aforethought, strike, penetrate and wound the said Basil H. Gordon, in and upon the back part of the head of him, the said Basil H. Gordon, giving to him the said Basil H. Gordon then and there with the leaden bullet aforesaid, by means of shooting off and discharging the said pistol so loaded to, at and against the said Basil H. Gordon, and by said striking, penetrating and wounding the said Basil H. Gordon as aforesaid, one mortal wound of the breadth of one inch and depth of six inches, in and through the head of him, the said Basil H. Gordon, of which said mortal wound the said Basil H. Gordon did then and there instantly die; and that the said William H. Bruff then and there feloniously, wilfully, deliberately, premeditatedly, and of his malice aforethought, was present, aiding, helping, abetting, comforting, assisting and maintaining the said Edward D. Worrell, the felony and murder aforesaid in manner and form aforesaid to do and commit—and so the jurors aforesaid, upon their oaths aforesaid do say that the said Edward D. Worrell and William H. Bruff, him, the said Basil H. Gordon, then and there in manner aforesaid, feloniously, wilfully, deliberately, premeditatedly, and of their malice aforethought, did kill and murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State. And the jurors aforesaid, on their oaths aforesaid, do further present that William H. Bruff and Edward D. Worrell, afterwards, to-wit: on the twenty-fifth day of January, in the year of our Lord one thousand eight hundred and fifty-six, at the County of Warren, and State aforesaid, with force and arms in and upon one Basil H. Gordon, then and there being, feloniously, wilfully, deliberately, premeditatedly, and of their malice aforethought, did make an assault, and that the said William H. Bruff, a certain pistol then and there charged with gunpowder and a leaden bullet, which said pistol he, the said William H. Bruff, in his right hand then and there had and held at

January 19.

Today the special term of the court opened for the trial of Edward D. Worrell, a severance of the prisoners jointly indicted having been heretofore granted. The prisoner was brought into court attended by his father and mother, and being called upon and the indictment being read to him, pleaded *not guilty.*

D. Q. Gale,[4] Circuit Attorney; *John D. Coalter*[5] and *W. V. N. Bay,*[6] for the State.

Uriel Wright,[7] for the Prisoner.

and against the said Basil H. Gordon, then and there feloniously, wilfully, deliberately, and premeditatedly, and of his malice aforethought, did shoot off and discharge, and that the said William H. Bruff, with the leaden bullet aforesaid by means of shooting off and discharging the said pistol so loaded, to, at and against the said Basil H. Gordon as aforesaid, did then and there, feloniously, wilfully, deliberately, premeditatedly and of his malice aforethought, strike, penetrate and wound the said Basil H. Gordon in and upon the back part of the head of him, the said Basil H. Gordon, giving to him, the said Basil H. Gordon, then and there with the leaden bullet aforesaid, by means of shooting off and discharging the said pistol so loaded, to, at, and against the said Basil H. Gordon, and by such striking, penetration and wounding the said Basil H. Gordon, aforesaid, one mortal wound of the breadth of one inch and depth of six inches, in and through the head of him, the said Basil H. Gordon, of which said mortal wound the said Basil H. Gordon did then and there instantly die, and that the said Edward D. Worrell then and there feloniously, wilfully, deliberately, premeditatedly, and of his malice aforethought, was present aiding, helping, abetting, comforting, assisting and maintaining the said William H. Bruff the felony and murder aforesaid in manner and form aforesaid to do and commit. And so the jurors aforesaid, upon their oaths aforesaid, do say that the said William H. Bruff and Edward D. Worrell, him, the said Basil H. Gordon, then and there in manner and form aforesaid, feloniously, wilfully, deliberately, premeditatedly, and of their malice aforethought, did kill and murder, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State.

[4] GALE, DANIEL QUINCY. (1807-1894.) Born Amesburg, Mass.; settled in Washington, Franklin Co., Mo., in 1837, and followed the trade of a carpenter and builder for some time; built the first brick house in Washington, was its Postmaster, 1838-1857, and Town Trustee, 1841-1876; Presiding Judge, County Court, 1840-1847; Circuit Attorney, 1850-1865, 1867-1869; Circuit Judge, 1869-1875; died in Washington, Mo.

January 20.

Mr. Coalter asked for a continuance, which was refused. The following jurors were then selected, after JUDGE STONE had ruled that the opinion formed from rumor, in order to disqualify a juror must be of such a fixed character as to enlist the feelings of the juror either for or against the prisoner and create in the language of the statute a bias or prejudice

[5] COALTER, JOHN D. (1818-1864). Born South Carolina and came with his parents to Missouri when they settled in St. Charles Co. Was sent to the College of South Carolina to be educated, and on his return studied law in St. Louis and was admitted to the bar; practiced law in St. Charles and was very successful; represented his county in the Legislature several terms and was a delegate to the Washington, D. C., Convention to devise means to preserve peace, 1860; "He eschewed office and never accepted any public position that he could consistently decline. He made no pretensions to oratory, yet was a forceful, clear and lucid speaker and impressed a jury most favorably. It is questionable if he ever had an enemy, while his friends could be numbered by thousands. He obtained the title of General through services rendered in the State Militia." Bay (W. V. N.), 468.

[6] BAY, WILLIAM VAN NESS. (1818-1894). Born Hudson, N. Y. Both his grandfather and father were lawyers in New York, the former a partner of Ambrose Spencer, some time Chief Justice of the State; his great-uncle, Elisha Hall Bay, was a justice of the Supreme Court of South Carolina, and was tendered by Jefferson a seat on the Supreme Bench, which he declined. His brother, Samuel M. Bay, after studying law with Judge Swayne, of Columbus, Ohio (afterwards a justice of the United States Supreme Court), settled in Union, Missouri, in 1833, was elected to the Legislature, became Attorney General of the State and Supreme Court Reporter, and died of cholera in St. Louis in 1849. William V. N. Bay joined his brother in 1835, studied law with him and was admitted to the bar in 1837. He was a member of the State Legislature (1842-1846), and a Representative in the 31st Congress (1849-1851). He was a Democrat and made but one speech in Congress which a writer of the day describes as follows: "It treated of slavery and the admission of California to the Union. It is a powerful plea for its admission as a free State, according to her overwhelming vote. It is a severe indictment against the Whig administration and a masterful example of a Unionist pleading with the North to desist from aggressions upon the South and a clear notice that his affection for the Union of the States surpasses his ties of union with his brethren of the South." In 1854 he removed to St. Louis, was appointed by Governor Gamble to the Supreme Court, and on June 14, 1865, he, with his colleague, Judge John D. S. Dryden, was forcibly removed by the military by the

against him: Joseph Woodruff (foreman), Thomas E. Renick, David M. Tyree, Burrell Roland, Reuben Bledsoe, Dorsey Waters, George Woodcock, Moses V. Kean, Jeremiah Pierce, William T. O. Dickinson, Jeremiah H. Williams.

MR. COALTER'S OPENING SPEECH.

Mr. Coalter. Gentlemen of the jury: At the request of Mr. Gale, the prosecuting attorney of this circuit, I rise, gentlemen, to address to you a few remarks. I do so at his request from my possessing an earlier knowledge of this case, it being one involving a transaction in another county, and which has been brought here by a change of venue. I hold in my hand the indictment which was found in Warren County, when it was brought to this court, and now proceed to read it to you. This indictment is founded upon a statute of your state, declaring two different grades of the crime of murder.[8] The words used in these two sections have been defined accurately by judicial construction. The word "wilful" means that a person intended to kill. It supposes an actual condition of the mind in regard to the killing when the deed takes place; and the words "deliberate" and "premeditated" in the act require that the killing must have been thought of before the act of killing began to take place, and that in order to constitute murder in the first degree, there must be a killing with intent to kill; to do the deed at

order of Governor Fletcher under the ordinance passed by the Convention of 1864, vacating all the judicial offices in the State of Missouri. See 35 Mo. Supreme Court Reports, pp. v-viii. He died at the home of his daughter in Eureka, Mo., and is buried in the Oak Ridge Cemetery, Kirkwood, Mo. For a History of the Bay Family see Schaff's Hist. St. Louis, Vol. 2, p. 1477.

[7] See 2 Am. St. Rep., 207.

[8] Statutes of Mo., Vol. 1, pp. 558-9. "Crimes and Punishments," Art. 11, Sec. 1. "Every murder, which shall be committed by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate, arson, rape, robbery, burglary or other felony, shall be deemed murder in the first degree"; Sec. 2. "All other kinds of murder at common law, not herein declared to be manslaughter, or justifiable or excusable homicide, shall be deemed murder in the second degree."

the time the act took place; and also that previous thereto the murderer intended to commit the deed.[9]

I desire in this opening to be very brief, and therefore shall not dwell farther upon mere definitions of law. This indictment contains two counts. The first charges the prisoner, Worrell, with being the principal, who committed the act, and that Bruff was aiding and abetting therein. The second count charges Bruff as principal, and Worrell as accessory. It makes no difference which did it, if both aided and were present. In such case the law considers them both equally guilty, as principals, and the result must be the same to each.

As far as I know the facts, they will be as follows:

Basil H. Gordon was an assistant engineer on the North Missouri Railroad. He was a young man from Virginia, the son of a widowed mother, and of a noble, lofty and generous character. In pursuance of his duty, he traveled with Major Walker, the cheif engineer of the road, and Mr. Sturgeon, the president of the railroad company, to the point where its line intersects the Hannibal and St. Joseph Railroad. There they parted. Messrs. Walker and Sturgeon went away to Jefferson City. Mr. Gordon started to come back down the line of road. He did not, however, arrive home. The weather at the time was intensely cold. His friends finally became uneasy at his protracted absence. They then began to make inquiry. They found he had been seen at a certain point with two men. After that the two men were seen without him, mounted and leading a third horse. Search was then made. The neighboring county became aroused, and much excitement began to prevail. There was a general belief there had been foul play. In the main road a little dog began scratching, and under the upper covering of snow found the beneath discolored, as though by blood. Near this spot it was heard a new saddle had been found. One man, in searching, must have stepped on the body. It was found near them, covered with brush and snow, stiff and frozen. A coroner's inquest was held, when it was found he had been shot in the back of his head. The bullet lodged in the brow, having

[9] Bower v. State, 5 Mo. 579.

passed through the brain. Gentlemen, the nature of that wound was such that he must have been summoned in an instant to eternity, without a moment's preparation. Gentlemen, every man, no matter how exalted, how pure, how good, must have time, however short, to meet his God. We all must make our peace with him. Mr. Gordon must have died in half a second. When the body was found all inquiry as to his fate of course ended. Two men having been last seen in his company, where were they? Immediate pursuit was made for them. Inquiry showed they were deserters from the army of the United States, that they had traveled in company with Mr. Gordon; that they also had stayed with him lately at a house about six miles from where the body was found. We, gentlemen, are all in the habit of trusting too much to external circumstances. Men of genteel appearance and pleasing manners sometimes win confidence they do not deserve. Perhaps Mr. Gordon trusted too much to the appearance and manners of these two men when he consented to travel in their company. At that house the prisoner, Worrell, had been seen to load a pistol. On the next morning all three had been seen together on the road. They were last seen with Gordon at a hollow in the edge of a prairie, in a place most convenient for the purpose of a crime. We expect to show that the horse they led was identified by peculiar marks. That this murder was committed on a Friday; that these two men stopped that night at St. Charles, and the next night at St. Louis. That horse, led by them, was the one Mr. Gordon had been riding, and was with them at St. Charles. They crossed the Missouri river there on the ice. They were afterwards traced to Vincennes, Ind. At that place, the prisoner, Worrell, sold Gordon's horse. There these men, whose names are Worrell and Bruff, parted. This prisoner went to Delaware; Bruff to Georgia. Bruff was arrested in Georgia; Worrell was taken at Dover, in Delaware. Worrell was found in possession of Gordon's watch and saddlebags. He not only did not deny, but actually admitted them to have been Gordon's. On his arrest there he was brought back. I will not speak of their respective statements. I will

say nothing of each trying to convict the other. It would make no difference. Both are equally guilty. But, I know from depositions on file in this case, that the main effort in defense of this man will be to show that he is not responsible for his conduct by reason of insanity. After the evidence is before you it will be a hopeless task to endeavor to argue that the defendant did not commit the act charged against him. No human eloquence would suffice to throw a doubt on that point; but the effort will be to show that, although he did the act, he is not responsible, because of insanity. I therefore call your attention to this plea, at this time, and lay down certain legal principles in regard to it. I call your attention to it at this time, because I wish you to view all the circumstances of this case, as they are detailed before you, and from them judge whether the man was insane at the time of the commission of the act. For on this the question will turn: Was he insane at the time of the act done? It is not material how eccentric or even insane he may have been at a previous time, if he was of sound mind at the time of the act done. And I wish you, in judging of this matter, to use your own common sense and knowledge of the human mind. After all the learning which may be displayed the determination of the matter must rest in your common sense and judgment. The question is about the human mind, and every man having a mind is capable of forming some judgment on the subject. It is not sufficient that a man may have had eccentric ancestors or relations, or even crazy ones, or that he may himself have been eccentric and erratic. These things are admissible in evidence only as they bear upon the question as to what was the condition of his mind at the time of an act done. You may call an eccentric man crazy, but he is not. The depositions which the defendant will produce in this case do not prove that he was ever crazy. A drunken man may be said to be crazy, yet when was drunkenness ever held to be an excuse for crime? Men sometimes make themselves voluntary demons. Is this insanity? Is this an excuse for crime? A most convenient cloak for crime would this be for any man to make himself a voluntary demon for that purpose! Mere

eccentricity of conduct in any man's life can never be considered an excuse for wilful crime. It never has been.

But I deny that the prisoner is crazy. If at previous intervals he may have exhibited such symptoms it has no application to this case. The hinge on which this question must turn is not as to—

Counsel for the prisoner asks *Mr. Coalter* not to anticipate what defense is to be made, but simply to state the facts the State expects to prove.

Mr. Coalter. I thought it fair—and in fact to the advantage of the prisoner—that the views of the State should be fully presented in the opening. I desired also to advert to this plea of insanity at this time, in order that the jury might keep their minds upon the conduct of the prisoner, as proved before them, and judge how far his actions corresponded with those of an insane man. But perhaps enough has been said at present, and therefore I shall close by requesting the jury to weigh well the evidence which shall be given, and thus be prepared to say whether the prisoner did the act as charged against him, and if he did, was he in a responsible condition of mind, and thus be prepared to render a true verdict in the premises.

THE WITNESSES FOR THE STATE.

Robert Walker. Am chief engineer of the North Missouri Railroad; knew Basil H. Gordon intimately for nearly twenty years. Early in January, 1856, Mr. Sturgeon and I determined to go up the line of the railroad. Directed Mr. Gordon, my principal assistant, to accompany me. The weather was so cold as to induce me to purchase these gloves (showing a pair of fur gauntlets). and advised Mr. Gordon to buy a pair just like them, where I bought mine—on the corner of Fourth and Pine, St. Louis. Gordon had a pair of fur cuffs which, I told him, would not be sufficient protection. He got a pair of gloves like mine. On the evening of Sunday, January 13, we left St. Louis. Mr. Sturgeon and myself took the cars to St. Charles; Mr. Gordon on horseback. We stayed that night in St. Charles, at the house of E. L. Wentz, one of my division engineers. On Monday morning, Mr. Sturgeon, Gordon, Wentz, Pratt and myself, accompanied by a negro boy (employed by Wentz), left, and after several days arrived at Bourbonton, in Boone County, previous to which Wentz left us. Mr. Sheerbarth, another division engineer, had joined us. Sheerbarth and I were in a sleigh. We all had

our daguerreotypes taken but left before the pictures were finished; and it was arranged that Gordon, on his return, should take one to Wentz's office, at St. Charles, and Sheerbarth would take the other.

We reached Huntsville, Randolph County, on the evening of Sunday, January 20. Next day we left Huntsville. Mr. Gordon, parting with us, to go alone, directly to St. Louis, while Mr. Sturgeon, myself, and Mr. Pratt went on to Jefferson City. Mr. Sturgeon and I arrived in St. Louis on the evening of January 26. Found, to my surprise, that Mr. Gordon had not yet returned.

Several days passed and I became uneasy; but as the weather was intensely cold and stormy, thought Gordon's absence might be attributable to this cause. Later I heard that a man named Ferguson had seen Gordon. Found him in bed; he told me that Gordon was accompanied by two strangers, whom he described (here the witness was stopped).

Well, from the statements of Ferguson, I suspected foul play. Directed McDonald to go on a search. On Tuesday morning, I went on a locomotive over to St. Charles; there was informed by Wentz's negro boy (witness was here stopped).

At St. Charles then I received information which convinced me that Gordon was murdered. Took Mr. Pratt with me in a buggy. We passed up the Boonslick road, making inquiries, without hearing anything of Gordon, until, late at night, in a snow storm, we met McDonald and Wentz near the spot where we afterwards found Gordon's body. From there I learned that Gordon and the two men had stopped at Hutchinson's (witness stopped).

Well, then, I received information which convinced me that Gordon had been murdered between Hutchinson's and St. Charles. Hutchinson keeps Private Entertainment, about four miles east of Warrenton. We all returned about five miles back to Kenner's Tavern, where we stayed till morning. After breakfast Messrs. Wentz, McDonald, Pratt and myself turned westward toward Hutchinson's to search. We found a gentleman (whose name, I believe, is Stevenson), who told me a saddle had been found by his mother's negro man (objected to and objection sustained by the COURT).

Saw the saddle at Mrs. Stevenson's; a dragoon service saddle, with initials on the pommel. Went to the spot where it was said to have been found, in a thicket, and about half a mile south of the road. The snow was very deep. We searched unsuccessfully.

Decided to go to Warrenton for help. On my return the body had been found. Recognized it as the body of Basil H. Gordon. It was between the traveled track and the fence, in a gulley. Think the body had been carried forty feet. Discolored snow (red) was near the traveled road, within two or three feet.

His gloves and fur cuffs and cap were not found with the body. His overcoat was unbuttoned, except the two top buttons. His pockets were turned inside out. His breastpin was the only thing of value left on him, and was concealed by his coat. Captain Couzins and Mr. Wentz went in pursuit. On their return Cap-

tain Couzins handed me this watch (here shown). Captain C. is a well-known police officer of St. Louis. I know this watch was Gordon's. Under a piece of black silk there is secreted an old-fashioned watch paper having on it the name of Gordon's father, and his mother's maiden name and the date 1802. Gordon joined me in 1854, at my invitation, on the Ohio and Mississippi Railroad of which I was chief engineer. Afterwards, I appointed him my principal assistant on the North Missouri Railroad. Had daily and hourly intercourse with him.

At Vincennes, I found Gordon's horse, saddle and bridle in possession of Mr. Gould. On Capt. Couzins' return, he showed me a daguerreotype case similar to that produced.

Cross-examined. Don't know the writing on the watch paper. Know the names of Gordon's father and mother, but never saw them. Either Couzins or Wentz took out the paper and showed it to me about the time the watch was handed to me. Never saw this watch paper in Gordon's lifetime.

There was nothing by which I could identify the saddle, but think it was the same; a black saddle covered with patent leather. The tree may have been a Spanish tree. There was a mark on the pommel of the saddle, the cuticle of the leather being scraped off. Of my own knowledge, cannot swear Gordon owned that saddle. The horse I would know anywhere. It was Mr. Morgan's. It was the same horse Gordon rode when he left us at Huntsville. I left Huntsville, and so did Gordon, on the evening of Monday, January 21. The spot where we found the body was perhaps 74 or 75 miles from Huntsville.

I was not there when the body was found. They had raked off the snow so that, though his face was uncovered, I saw only glimpses of his coat. Don't know what became of the saddle found in the thicket. Left it at Mrs. Stephenson's. Don't know how Mr. Gordon's clothes were marked. He told me he bought clothes for that trip.

Re-examined. From the traveled track to the discolored snow could not be more than 2 or 3 feet. From the top of the snow to the bottom of the gully on the day the body was found, must have been about two or three feet deep. The soil is red clay, very tough, but easily washed.

Warren V. Stuart. Knew Basil H. Gordon. Lived at Warrenton, Warren Co. Last time I saw him was January 24, 1856, a cold evening and late, at Warrenton. Saw him on horseback, setting near Mrs. Sander's door, the principal tavern, about 4 or 4:30 P. M. Prisoner was sitting on a horse, about 30 or 40 feet from him; and there was a man also, I don't know who he was. This man I spoke to. He was not then on his horse, but afterwards he got on his horse and went off with Gordon and the other man. (Bruff is brought in.) That is the man I speak of. Heard Worrell say nothing. Saw the three go off together, traveling eastward. Never afterwards saw Gordon alive. Helped to take the snow off of his body in the gully, when afterwards discovered, about six miles east of Warrenton, in the edge of the Hickory

Grove Prairie, the nearest house west of it being Mrs. Stevenson's. The feet of the corpse were lying nearly east, head west, and twirled over very much. Saw the body stripped and examined. There was a large cavity in his head, about as between my fingers. Did not examine the depth of the wound. The ball did not come through and through. The wound was evidently done by a leaden ball. The body was frozen, and must have laid there eight or ten days, from appearances. It had not decomposed. The body had been discovered just before I reached the ground. Helped uncover it. There was considerable bloody discoloration in the traveled road, somewhere from 25 to 35 feet to where the body was found. There was a coroner's inquest. The body was discovered on the 6th of February, 1856. He passed through Warrenton, January 24, 1856. There were several snows between these dates. I know at least two.

Cross-examined. The gully was so deep a person traveling the main road would not be apt to see it, and there were also several pieces of brush thrown over the body. Think no person could have seen the body. Knew the horse the moment I saw him. Always take notice of horses. He was rather lengthy, pretty rich looking. Gordon stopped in front of Sander's hotel. Gordon in front of the door, next Worrell a little behind; and they all went off together.

Re-examined. The body was several inches beneath the level of the general surface. There was much ice and snow over the body; a good many inches. We took rails off the fence to warm us until the coroner came, which took three hours.

Henry Ordelheit. Live in Warren County, six miles from Warrenton, towards St. Louis. Did not know Mr. Gordon. Was present at the discovery of the body. It was in a sort of ditch, in the middle of the old road, where the water sort of run through, near Mrs. Stevenson's farm. Was right by it when we did discover it. It was searched by us on the right hand of the road. Mr. Pratt and others searched. We could not discover anything at first. Mr. McDonald, myself, Arnheit and Werlet discovered the body. We sent at once for the squire, as the coroner might not be at home. We did not move the body until he came. Examined the body. His nose was bent as though it had been stamped upon, the face was bloody, his left arm underneath him.

Cross-examined. The body was coffined at the place, and taken to St. Louis. Don't recollect the names of the persons present.

James Ferguson. Live in Montgomery Co., Mo. Defendant stopped at my house, on the Boonslick road, 11 miles west of Warrenton. Mr. Gordon and Bruff were with him. This was about January 24, last. Don't keep entertainment but had been boarding one of the engineers. Mr. Walker and Mr. Sturgeon and Wentz had gone up with Mr. Gordon. On his return, Worrell and Bruff were with Gordon. Had bought a pony of Worrell, and Worrell came in the yard to get his money. Identify him as the prisoner. I have seen Bruff since. I bought the horse from Worrell. It was a mare, rather

a pony mare, a sorrel. "A man claimed the horse as stolen," (objected to and excluded by COURT). I identify Bruff, who is now brought in.

Cross-examined. Never saw Worrell before that day. Saw him soon after his arrest in St. Louis jail in a cell. Two cells were pointed out as containing them, but not discriminated. Have seen him about four times since I first saw him. I went to his cell about three times. Went to see him about the pony. The first time I saw him at my house. He hallowed to me to sell me the horse, and on my not agreeing he rode on, but in fifteen minutes they all came back, and I bought the horse and paid him. He looked like a very genteel man. He had whiskers, by which I mean beard on the face. Think he had mustache; don't recollect. His beard was long. When I saw him in the cell, he had been shaved, and he had a small beard which had not grown very long. When I traded with him, noticed him particularly, as I do every man I trade with. Knew Gordon. Not positive what sort of horse he or either of them rode.

Re-examined. There is no doubt in my mind that the prisoner is the one who sold me the pony. Saw nothing wrong with him; he appeared rational and shrewd in a trade.

The reason of my certainty is that I know him, by his features, and also by conversations between him and me of things nobody else knew. Memory, therefore, helps it, independent of which I think I would recognize him, but that strengthens it.

George T. Camp. Saw prisoner at Warrenton on the evening of January 24, 1856. He was in company with Gordon, and a man have since heard called Bruff. Was standing in the upper part of town talking, and saw three men riding up, one of whom I recognized as Gordon. He stopped and chatted with me about ten minutes. Urged him to stay all night, but he desired to go on to Mr. Hutchinson's, to make his ride easier next day. Identify Bruff.

Cross-examined. Both Worrell and Bruff attracted my particular attention because I thought they might be new contractors or engineers on the road. Am a contractor for ties to the Railroad.

Wilson Hutchinson. Live four miles east of Warrenton, on the Boonslick road. Am a farmer and entertain travelers. The first time I saw defendant was in January, 1856, at my house. He came there January 24th, about dark, and he and a man then called Gordon, and a man then called Bruff, remained there all night. Identify Bruff as the same man, and Worrell as the same man who were that night at my house. I have since seen them in St. Louis jail. They left my house between seven and eight o'clock next morning. They all came together, and went together eastward on the 25th. After they had come in that night, Worrell took out a pistol and loaded it.

January 22.

Wilson Hutchinson. There was a right smart but not a great deal of snow on January 25th. It was still snowing and quite cold. Next time, after Gordon left my house, that I saw Gordon, was when the body was found in the gully, and the snow taken off

his face, two and a half or three miles off. Have since then seen Worrell in St. Louis jail. I recognized him, and he recognized me. This was the first time I saw him after he left my house. When I entered the jail two friends went in with me. I walked behind them, they went in first. Worrell was then in the large hall, not in the cell. I saw the catch of his eye. Worrell at once stepped 'round, shook hands with me and said, "How d'ye do, sir," and asked me if I was well. I asked him if he was, telling him I was. He did not speak to the other gentlemen. I asked him, "Do you know me, sir?" He said, "Do you know me, sir?" I said I thought so. Whereupon he asked the jailor to let him go back to his cell. He would rather go back to his cell. I then went with the jailor to see Bruff. The cells are opposite sides of the jail. I recognized Bruff and he me. He was the same man that was at my house. While I was there, the jailer who had left me, mentioned to me that he, Worrell, wanted to see me before I went out. I went; Worrell remarked I looked fine and healthy. I said I was. He then asked if my family was all well. I said yes. He did not appear to want to talk much, but he asked me if the roads were good. I told him I supposed they were. He said, I suppose the roads are pretty good. I asked him then before I left, "How far did you go that day when you left my house?" I am a little too fast. Then says I, "Did you call on those men you decide to call at and get your dinner?" He said, "I went to St. Charles." Then said I, "I suppose you did not call on those men you said you was going to call on?" "Did you call on Dr. McIlheny and Dr. Watkins?" He said, "No." At my house, in conversation, before they started, Worrell had most of the chat. It was very cold. He asked me if there was a good house about thirty miles off, where they could stay all night. They were going to St. Charles. I told them Dr. McIlheny kept a good house just 30 miles from my house. Then he wanted to know if there was a good halfway place to get their dinners. I told him Dr. Watkin's. It was a very good place just 15 miles from my house. Worrell did most of the talking, though Gordon and all agreed to stop at Dr. M. all night, and at Dr. W. at dinner. It is 36 miles from my house to St. Charles. Worrell took down their names on a piece of paper so as to recollect them. In jail, W. said they went to St. Charles that night.

When I first saw the body it was in the snow, the face partially uncovered; he laid in a kind of a twist, one arm under him, his head to the west. He had on an overcoat, and a fur of some animal, and leggins. There was a wound, a hole, right in the back part of his head. A young doctor ran a stick about as big as the Judge's penholder, about 4 inches into it, just like a bullet hole. Saw no bullet. I saw no other wound, except his nose was to one side. When I first came, his face was the only thing uncovered. The rest was covered with snow and brush, which appeared to have been brought there. It appeared to have been cut before and laid over him. The gully was not very deep. Any man

going east, going towards him, could have seen the body, if he had not been covered, at about 40 yards before you came to him.

Cross-examined. If there had been no snow, the brush would not have hid him. There must have been one or one and a half feet snow fallen between the time he left my house and the time he was found. Never saw Gordon before, as I recollect. When I told Worrell about Dr. Watkins, Gordon, I think, said he had seen him, but did not know him. He said he had heard the name of Dr. McIlheny, but did not know him. Don't know how many barrels the pistol had; did not have it in my hand. There was no concealment about it. He talked a good deal more than either of the others. Worrell afterwards set in his chair after supper, as any gentleman would. He did not shoot off the pistol at my house. When he was taken back to Warrenton, know he recognized me. He stopped and got water at my gate, but did not get out.

Clay Taylor. I reside in Warren County; was on the way to my farm, on 25th of January last, from St. Louis. Then first saw Worrell on the Boonslick road leading from St. Charles to Warrenton, about 15 miles east of the place where G.'s body was found. Was driving a buggy. There were three buggies in our company. Was with Col. White, my brother-in-law and others. My attention was attracted to the persons we met. Worrell was riding a chestnut sorrel horse, to the best of my belief. Mr. Bruff was with him riding a dark brown horse, and leading one of the same color without any saddle, but I recollect well there were saddle marks on him. Col. White, who is considered a Napoleon of the turf, remarked on seeing W.'s horse: "That is a damned fine poor man's horse." Was struck by the remark, and it made me notice it. Our meeting made my mare shy, which nearly upset the buggy. This made me notice it. It was a chestnut sorrel horse. I have seen Worrell and Bruff several times since; in jail and at Warrenton. That is Mr. Worrell. I spoke to him since I came in. In jail I asked Worrell (this was at night, the night he came to St. Louis), if he recognized me. He looked at me closely and said, I think I do. I asked him, if he would state where he had seen me before. This remark was in these simple words: I am not certain, sir, whether it was at Warrenton, or on the road this side. I then asked him if he recollected the circumstance of meeting three buggies together on the day of the murder. I may not have said murder. I said "unfortunate occurrence." He said he thought he did. I asked no other question, but Mr. Isaac H. Sturgeon, who was with me, asked him, "Mr. Worrell, will you please state if my friend suffered much after he was shot?" Worrell who was standing looking at us, dropped his head (I shall never forget it as long as I live), and replied, "He did not suffer." Had no further conversation at that time. Subsequently went to see him. After passing the compliments of the day (at the same place, and with no view of extracting anything, several days after), I asked him how he was. He replied, "tol-

erably well." He seemed to be low-spirited. I thought I would not prolong the conversation, but said to him, "Mr. Gordon was a co-laborer of mine on the railroad, he was a near friend of mine; please state whether he suffered or not after he was shot?" His reply was in these very words: "I can assure you, sir, he did not suffer." Was not present at the finding of the body, but got there just afterwards, and before the coroner was called. Did the writing for the coroner at the inquest. I personally and particularly examined the body. Found a wound on the left side of the back of the skull. Young Mr. Briscoe was called on to probe the wound. It was a gun or pistol shot wound, about 4 or 5 inches deep, ranging from the left ear to somewhere about the right eye. His hair was full of coagulated blood, which made it difficult to find the wound. Have seen many gunshot wounds. I was in Captain Weightman's Company, at Sacramento, when we buried 350 men. It was a pistol shot. I think this ball of a cavalry pistol (showing one) would be the mate of one found in that wound. If the head was severed from the body, his death could not have been more sure than from that wound. Have seen others shot in same way, and they did not live a minute.

Cross-examined. I have seen wounds made by same kind of pistol. From the mere aperture I believe a pistol with a conical ball would make exactly such a wound. A round ball would not. I examined the body particularly, and found a diamond pin on it. I took it off; several things, a note book, a foot rule, etc., and handed them to Major Walker; also some keys.

Re-examined. The diamond pin could not be seen when he was found, because his coat was buttoned over it. His head was uncovered. He had on no gloves. One hand was bent under him. His cap and gloves were missing. Don't think there was any money found on him. There was no watch found on him.

William Park, M. D. Am a physician, have practiced very little as a surgeon, but have seen a great number of wounds. Have heard the testimony describing this wound. In the way the last witness described it, it must have produced death, but often where a straight wound goes through the head, the person may recover, and neither death nor insanity ensue. The oblique direction of this wound must have produced instantaneous death.

Dr. Childs. Have heard the examination. The testimony has not been sufficiently definite to pronounce on; it seemed to be conjectural. If the ball passed through the brain to the right eye, it would have produced instantaneous death.

Cross-examined. Have heard no definite testimony as to the range of the ball. Understand Mr. Taylor to say he supposed the ball took that range, not that it was so. Think the wound would produce death. But without a post-mortem examination, don't think anyone could pronounce definitely. I don't think one could pronounce without knowing where the ball went to with certainty without an aperture.

Re-examined. A wound in the

back part of the head is more fatal than in front. Suppose this wound did not touch the spine, which would produce death, but judge from the description, it severed a diverging nerve, which would also produce death.

William H. Pace. Have seen the prisoner, on 24th of January last, at James Jones' first, in Montgomery County, on Boonslick road, ten miles west of Warrenton, two other gentlemen with him; did not know them. This prisoner was one. They came in to pay their bill to Mr. Jones. The third man I did not notice much. He seemed to be a tall, slim, slender man. Saw them two and a half miles from that place on horseback, going east towards St. Louis, where I was going. There were three men. They passed me. I stayed that night at Warrenton. Next saw them next morning at Hutchinson's.

One of the men came out of the gate next morning as I passed Mr. Hutchinson's, and remarked I had got a very early start. Mr. Harvey was with me. Saw one man appear to go towards the stable, but I did not see any horses out. Again saw these men about five miles from Hutchinson's. There were only two men, and they led a third horse. Thought they were the same men. They passed me. There was no saddle on the led horse. Did not pay any particular attention to the horse. It was snowing very fast. I afterwards again saw them. I supposed they had stopped upon the road. About five miles after they first passed me, they came up again about one-half mile from Mr. Kerwin's, and I think Worrell said it was a very unpleasant day.

Cross-examined. It commenced snowing, the evening I left Mr. Jones', 24th January. Jones' is fourteen miles from Hutchinson's. Stayed all night at Mr. Glenn's, a tavern formerly occupied by Mr. Harper, about four miles west of Hutchinson's. Jones' is ten miles from Warrenton. Breakfasted before I left Glenn's. My companion was Ford Harvey. We traveled in a two-horse wagon. One of these men, don't know which (I was in the wagon and only saw the glimpse of him), spoke to me as we passed Hutchinson's. About five miles below Hutchinson's we were overtaken by them on horseback, leading a horse. Five miles below there they overtake us again. Mr. Worrell, I think, said it was a bad day. It snowed tolerably fast all that day. Did not notice the horse the man was riding who spoke to me. I did not then see them afterwards; but have since—in September—seen him in jail. We did not speak to each other. Went to the jail with Mr. Harvey, Ferguson (witness) and the sheriff.

Ford Harvey. Have seen prisoner, January 24th, twelve months ago. Saw him at Jones', on Boonslick road about ten or twelve miles from Warrenton. Mr. Pace was with me, and we were going to St. Louis. Understood the two men with him then were Gordon and Bruff. Next time I saw him was on same day, about two or three miles east of Jones.' They were traveling on horseback. Next morning saw them again at Mr. Hutchinson's. Did not see all at Hutchinson's, I saw one of them on the porch, not far from the road, and the other near the stable. Mr. Pace

was in the wagon with me. I did not see them again until at Hickory Grove about two miles from Mrs. Stevenson's. Then there was only two men. One I saw before was leading a horse without a saddle. Saw them at the creek, below Mr. Kenner's. The horses were drinking. The two men I saw the day before and three horses.

Cross-examined. Mr. Pace and myself occupied the same wagon. These men passed us beyond Jones' about two and a half or three miles. They then had no conversation with us. It was not then snowing. This was on the evening of the 24th. Had a full view of the gentleman on the porch next morning and believe it to be Worrell. Next I saw the two men about two miles from Mrs. Stevenson's. They were all going the same way. No conversation passed between us. It was snowing very hard. Next I saw three horses hitched at the grocery opposite the church. Can't say what was the color of the horses. Believe the man who spoke on the porch was the man who spoke at the creek, and his manner makes me believe it was Worrell. His remark was, "We had an early start that morning," referring to Pace and me. He wore a large beard, and we made some remarks about its being covered with snow and icicles. Did not observe any mark on his face. Did not see Worrell afterwards, until here, at last September term. The man who spoke to me at the creek had a long beard, longer than mine. I am pretty certain he had a moustache. Did not take so much notice of Bruff. He sat with his back to us.

Martin McMahan. Have seen prisoner, saw him at Christian Way's, at the town of St. Charles. Way keeps a boarding house there. There was another man with him. Don't know his name. I have seen him here and at Warrenton. (Here Bruff was sent for.) Recollect that man. He is the one that was with Worrell. It was 25th January. Noticed their horses. They stayed all night there. They had three horses. Bruff had two horses. Wanted to buy one of them, but did not. He wanted $80 for him. A negro came across the street at the time, and asked Worrell who was riding the sorrel horse, if he had bought it from Mr. Gordon, and Worrell replied, no, that it belonged to himself, that he had bought it from up the country.

Cross-examined. Was a boarder at Way's, who kept that tavern. First saw them about 5 or 6 o'clock P. M., after they came. I was in W.'s company until they went to bed. W. got his supper there. Saw him next at breakfast next morning. Prisoner was then standing at Bruff's side. They were watering their horses previous to starting. When the negro spoke to W., both of them were sitting on their horses, and Bruff was leading one. No one else was present. This negro belonged to Mr. Wentz, the man connected with the railroad. I work on the road. Don't know what became of W. They went to the ferry landing and crossed the river on the ice. W. did not say where he was going. Worrell said to the negro, they had not bought the horse from Gordon, they had brought him down from the country, and belonged to him. Know his appearance. I was not able to pur-

chase him, and did not try to buy the sorrel horse.

Hartwell Richards. Have seen prisoner near corner of Broadway and Mullanphy street, St. Louis. Kept boarding house. About January 25th, 1856, Worrell came to my house, between 11 and 12 o'clock, and stayed until Sunday. He stayed about one day. There was another man with him, named Bruff. The prisoner is that Worrell. Have seen Bruff here. At my house, Bruff went by the name of Charles Strong, and Worrell by the name of John Ross. Asked them their names when they went away. Did not register their names. A young man at my house did. They had three horses, one a chestnut sorrel horse, the other two bays. The sorrel horse had a knot or rising about his throat. One of the bays, I think, had a blazed face. When they left they went down Broadway. They said they were going across the river on the ice over to Illinois. While at my house, W. was jovial with several of my boarders. They started to go to the theater together, and returned between 11 and 12 o'clock, the usual time of people coming home from there.

Cross-examined. Then kept public house on Broadway. Did not do a great deal of business. Had commodious stables. Travelers stopped there, chiefly those who brought in horses and mules to sell. Don't know whether the large hotels in St. Louis have stables. Never saw W. before he came to my house. I think W. gave his name as John Ross. Asked each their names at different times in the absence of each other. W. showed no disposition for any concealment. He was as public as anyone else. Conversed a few words with him, but held no particular conversation. There was nothing peculiar in his appearance. He was jovial. Robert Williams went to the theater with them. He was boarding at my house, but has since removed to Leavenworth City. W., I think, wore two watches. I know he wore one. He wore it conspicuously so you could see. Broadway is one of the most public streets in St. Louis. Noticed nothing peculiar about his face, whether a wound or otherwise. He had much hair on his face. Saw him in jail after he came back and spoke to him then. Recognized him. He did not at first recognize me, but he did after I called his attention to me by speaking to him. Believe he observed, he ought to know me, but could not call my name. I said nothing more to him except to ask him, if he recollected when he stayed on Broadway, and probably told him my name. He then said, "Now, I know you."

Samuel H. Gould. Live at Vincennes, Indiana. Have seen Worrell and Bruff at both Vincennes and here. They were at Vincennes from 2nd to 6th of February. Saw them every day. B. not so long. They were at my father's house. Father and I keep hotel there. They had 3 horses with them. One a sorrel rather dark, one a dark bay, and one a light bay. The sorrel was of fine appearance, and a horse which would attract attention in the streets. It had a bunch or lump under its chin where the curb would come. My father bought him from Worrell, and

sold him again. We purchased the horse, saddle and bridle. All three horses were sold in Vincennes. Worrell left on the train for Terre Haute and Indianapolis. Worrell sold two of the three horses, Bruff one. I paid $65 for the horse, was worth not much more at that time, was much jaded. If he had been in good order he would then be worth $125, as horses sold. Worrell went by the name of E. C. Worrell. He entered that name on our register. Father took a bill of sale of the horse. They had two saddles. The one I bought was plain black with gray skirts. The pommel had been scratched or rubbed off, and blue ink had been put on it. W. was dressed in blue miltary pants, black coat, and common black cap. He had gloves like those Major Walker has on (here shown). He did not wear them away; he traded those gloves to my father for another pair. He had several rings on his fingers. He had a watch, which he took away with him. I think it was attached to a common guard like this (braid). He also traded a small seal to my father.

The cars leave at 6 o'clock. Had arrived on Saturday.

Cross-examined. He did not at any time conceal himself. He was a very conspicuous man while he stayed there. Father changed gloves with him just before he left. W. went all about town, and made several acquaintances. He did not wear his watch conspicuously. Saw him pull it out once. He wore several rings on his fingers. He registered his own name. He did not pretend to go there by any other name than Worrell. Next time I saw him was in St. Louis jail. He recognized me immediately in the jail, and before I could fairly see his face, he called me by name. Shook hands with me. He asked how my father was. When Worrell left Vincennes, he said he was going to Georgia, after going east first. He sold both horses, saying his partner had gone off with all his money, and he was compelled to sell them to pay his bill. Bruff had then just gone. None of his conduct while at Vincennes appeared to be strange. He seemed disposed to try and make himself agreeable to every man he met.

Isaac H. Sturgeon. At Vincennes about February 15, 1856. I found in Mr. Gould's possession my horse, which on January 13, 1856, I let Mr. Gordon have. Also found there the saddle and bridle that had been put on the horse which on January 13th I loaned to Basil H. Gordon, who started alone, saying he was to be accompanied by others from St. Charles, who had gone on by the train. I am sure of the horse, a chestnut sorrel, with a small star on forehead, a snip on end of nose and a very hard little wen under the jaws where the curb would come. The Mr. Gould who is here, is son of the old gentleman who kept the hotel. Mr. George Signer owned the saddle. Knew it. I rode it down town one day in St. Louis, and carried iron hinges on the pommel of it. It was black, shiny leather and got scratched. I covered it with blue ink, which left a blue spot instead of a black one. Also know the bridle by a particular mark, by an old snaffle bit I put in instead of a gay bit, when I got it from Mr. Sig-

ner. Found the saddle in a bag in Mr. Gould's granary.

Cross-examined. The saddle, except natural wear and tear, was in same condition as it was when I had seen it last before. The horse was easily identified.

George A. Signer. Know the horse and saddle which Mr. Gordon rode away last January. The horse was chestnut sorrel. The saddle was mine. It was a black English tree saddle. I lent it to Gordon, January 12, 1856. Afterwards saw it at Vincennes, in possession of Mr. Gould, somewhere in February, 1856.

January 23.

Erasmus L. Wentz. Know Worrell. Saw him first time at Dover, in Delaware, in the street. Next day saw him; he came in company with Capt. Couzins to a handcar which I was standing alongside a railroad track. We all got on the hand car: self, Couzins, Worrell and two other gentlemen who were along. Capt. Couzins put a pair of handcuffs on Worrell. At this point Capt. Couzins gave me a watch that I knew. (Watch produced is the same Major Walker testified.) This is the watch. Immediately recognized this watch as Gordon's. I had often before had it in my hands, at my house, in St. Charles, and had compared watches with Gordon. I used to see Gordon frequently. He stayed at my house at least a dozen nights, and I used to be with him on the line of the road. Was division engineer, and reported direct to Mr. Gordon. We left Dover on the handcar. I there told Couzins I knew that to be Gordon's watch. Went on the handcar to a town called Smyrna. Stopped there in a small depot for the train. While there this watch came up again. On examining it, in Worrell's presence within a few feet of him, I again told Couzins I was still convinced this was Gordon's watch. I knew it to be so. Worrell then replied to what I had said, "Gentlemen, that was Mr. Gordon's watch." Had a pair of saddlebags hanging on my knee, which Capt. Couzins handed me on the handcar. Worrell continuing what he had said about the watch added, "and those were Mr. Gordon's saddle bags." I never had observed the watch-paper in the watch previous to this, but afterwards found the watch-paper. The last time Major Walker, Gordon and Sturgeon went up the road together. I went with them from St. Charles to Mr. Singleton's, about 12 miles above Mexico. A negro boy belonging to Judge Thomas of Bridgeton, but in my employ, was along. The party consisted of Mr. Sturgeon, Walker, Gordon, Self, Pratt and this negro boy called George. When Worrell was arrested he had whiskers on, about two shavings long. When we went on that trip up the road Gordon rode a sorrel horse belonging to Isaac H. Sturgeon.

Cross-examined. Was frequently with Gordon on line of the road. Can't say I had been above Warrenton with him before this last trip. Was not at the finding of the body. Was there a few moments after, and uncovered the body. There was nothing in the saddle bags when they were given to me. I parted with Gordon at Singleton's. When I left him he did not have the saddle bags. Got to Dover

about 26th of February last, about 11 o'clock. Couzins arrived about 8 o'clock in the evening. Had no warrant for his arrest; was not present when he was arrested. We first found his name at Crestline, on the Cleveland & Columbus R. R., on a register. I was in Vincennes two or three times. In going in pursuit I stopped at Gould's. Couzins was along. We found at Gould's a name on a register there, a name Mr. Gould told us was registered by him. I don't think it was Worrell; at any rate, if the name was Worrell, it was E. C. Worrell and not E. D. Worrell. We stayed there some three or four days. After I arrived at Dover I found Worrell was stopping at the same public house I stopped at. Met him several times in the course of the afternoon. He was walking about. Don't recollect seeing him talking with any person. I heard, while there, his parents lived in Dover. Capt. Couzins thought it advisable not to arrest him immediately. We had a man watching Worrell—a constable in Dover. Went to the railroad to get hand car, and Couzins and others went to the hotel to get Worrell. Think the others were the deputy sheriff, the policeman from Philadelphia and also Mr. Wheelock went along with them. Did not speak to Worrell before his arrest. Don't know that Worrell, before that, was apprised we were all after him. Worrell did not then say, that an hour before he was arrested, he had information we were after him. When Couzins handed the watch to me at the hand car, and said it was Gordon's, Worrell did not make any reply. In his subsequent remark, "it was Gordon's watch," he said nothing about the watch paper. When Couzins handed me the watch he told me it was found in Worrell's vest pocket. He said he found the saddlebags in the room. Never had seen prisoner before, but knew him from the descriptions we had of him. The first mark I recognized was a patch on toe of his right boot, next by his military pantaloons; his cap also answered the description which had been given to us. Later met him and observed his features closely. Saw he had scars on his face, which had been described to us. I went through Pittsburg on my trip. From Vincennes went to Terre Haute, Indianapolis, Cincinnati, back to Indianapolis, to Terre Haute. Went back to Indianapolis, then back to Terre Haute, then to Vincennes. Thence to Crestline, thence to Pittsburg, Harrisburg, thence to Philadelphia. Captain Couzins parted with me at Harrisburg, and he went back to Baltimore, and self to Philadelphia. I went to Elkton, thence to Charleston; then I returned to Georgetown crossroads, a point I had passed through, then to a place called Millington, thence back to Georgetown crossroads, thence to Surgena, thence to Dover. When arrested he had a good many rings on his fingers. We had at several points heard him described as a man wearing a good many rings. He had been described to us as a man having worn a very heavy beard, mustache and all long, and which is generally termed a pretty beard, black. I first got that description at Warrenton. We

traced this description until we got to Pittsburg, where we learned he shaved. After this the description was the same except his beard.

Captain J. E. D. Couzins. Reside in St. Louis; am present employed by the insurance companies as inspector of buildings. Have been in the police many years—captain and other offices therein. Saw prisoner first time at Dover, Del., in a tavern there. Mr. Worrell came with me and one or two others to the railroad there, where we met Mr. Wentz. This watch was in the pocket of a vest on the bed in which Mr. Worrell was sleeping at Dover, in Delaware. When we got in the hand car I handed Wentz the watch. When we got to a little town depot called Smyrna, I asked Worrell whose watch it was and he said it belonged to Mr. Gordon. I identify this as the same watch. Between Alton and St. Louis, on our return, Mr. Wentz again asked me for the watch. There was also a pair of saddlebags, together with a trunk, in the room, and some other things brought there from Worrell's room, and most of them are now here. Worrell said the saddlebags belonged to Gordon.

Cross-examined. I gave the trunk to prisoner or his friends at the jail at St. Louis; a small common trunk, not very old. We got to Dover Thursday evening. He was arrested that night between 12 and 2 o'clock. We went into his room and took him out of bed—in his room at the hotel. He had been described to me as having a tattoed mark on his hand and a scar on his cheek. I examined his hand before he got out of bed. Had a piece of candle. The room was dark. There was another gentleman sleeping in the same room. Was not ready to arrest him before, because I wanted no difficulty, and wanted to get the deputy sheriff of that county there. There are always more or less difficulties when a person is surrounded by his friends. Did not care about anybody's knowing of my arrest of him until I got him. Had warrants for his arrest both in Maryland and from Wilmington also, in Delaware. He had been described to me as a man with a very large mustache and beard. When I found him it was shaved off. I found in Baltimore a tailor's shop where he had bought some clothes he got there—a vest, and I got a piece of the cloth of which it was made. He had a pair of military pantaloons in his trunk. We knocked at the door, and the man sleeping by it opened it. I took hold of his hand and examined it. One of us told him he was arrested and to get up. We pulled the clothes off, examined him to see if he had any arms; then made him get out in the middle of the floor and dress himself. He asked what was the matter. He got on his clothes directly, and I took a pair of handcuffs out of my pocket to put on him. He said he would die before he would have such things put on him. I said, very well, and desisted, and put them back in my pocket. He made no demonstration of fighting—only talked loud and jumped back a little. He asked why we did not come in the daytime. I told him his parents lived there, it was a very painful matter, and

we did not want them to see it. He then said he was very glad. He afterwards told me he had been expecting it. He seemed to go willingly. He could not do otherwise very well—a man had hold of each arm. He made no refusal to come willingly, except as I said before, he refused to have the handcuffs put on in the room. When we got down to the hand car I did put the handcuffs on him. I told him I never traveled in custody of a prisoner unless he was well secured, and he was my prisoner. He then held up his hands and I put them on him. In Philadelphia he told me he knew we were after him. Did not consult any lawyer at Dover. Saw Mr. Wentz as soon as I got there. Don't know of Worrell's giving out clothes for washing in Dover having Gordon's name on them. He said they were Gordon's saddlebags. I at the same time asked him whose cloak that was left at Vincennes? He said that cloak would tell the tale, or something of the kind, and then asked me if there was any blood on it. He soon became very much affected and began to cry about his parents. He said the cloak belonged to the other man. Don't know what has become of the cloak. Was at Mr. Gould's tavern, at Vincennes. Father and son were there. Think Worrell had two coats on. It was very cold and I got two coats from the men on the hand car to cover him. He cried a good deal in Philadelphia, where several policemen came in. Sometimes he chatted with them. He was always affected about his parents; otherwise seemed cheerful. At Terre Haute Mr. Wentz and Worrell were handcuffed together while sleeping. Saw no more sudden depression of his spirits than persons in his situation would ordinarily exhibit. I think there was a daguerrotype amongst his things; it was of a lady and given back to him by direction of Mr. Sturgeon. There was also a daguerrotype case found in his trunk. These articles I show here were found in the possession of Worrell: One military pants, one portmonnie, one powder flask, one bullet-mould, one daguerrotype case, empty. The portmonnie contains Mr. Gould's receipt for four days' board at Vincennes, a $1 bill, the Baltimore tailor's card, two round bullets, two or three rings, a small key, two breast pins, a lock of hair. At the time he said the saddlebags and watch were Gordon's. I don't think I asked him if he killed Gordon. When at Smyrna, some one asked him there whether it was he that killed him, and Worrell said that the other man was a Mason and Odd Fellow, and he was not; that was the reason he did not speak about it.

MR. WRIGHT'S OPENING SPEECH.

January 24.

Mr. Wright. It becomes my duty now, gentlemen, in conformity with the practice of this court, to open to your consideration some propositions of law and fact arising out of

the case made by the prosecution, and to shadow forth the grounds of the defense.

The defense will be embraced under two general heads:

I. I shall consider first (on the supposition that Worrell is to be treated as a responsible being—a rational creature, having control over his action—a man, amenable to his Maker and to government) whether the State has proved the charges against him as they are set forth in the indictment. We have in Missouri two kinds of murder—one takes life, the other only liberty. Has the proof affected the prisoner with the killing of Gordon? Has the circumstantial evidence excluded every hypothesis but his guilt? May all that has been proved be true—and yet Worrell not kill the deceased? If so, the circumstantial evidence is insufficient for conviction. There is no positive evidence in the cause—all is circumstantial. No human being, from the proof, knows the circumstances under which Gordon came to his death. We have to reach conclusions from circumstances only, and they are insufficient to establish the fact that Worrell killed Gordon. Every fact proved may be true—and yet Worrell may not have killed him. This is the legal text of insufficiency. It is an indispensable legal quality of circumstantial evidence, that the supposition of the guilt it seeks to establish is the only thing that can explain the facts proved. It is not my purpose now to analyze the testimony offered; but in spite of what has been said by way of estoppel of the defense, by my friend, Mr. Coalter (who comes into this tribunal as the employed agent and representative of the friends of the deceased), to him, to the worthy officer of the law, Mr. Gale—to my other excellent friend, Mr. Bay, whose position is not defined, whether adjunct representative of the friends of the deceased, railroad attorney or patriotic volunteer—to all this array, I present propositions of law and fact, touching their case which may demand their joint attention. In the beginning you were told, by Mr. Coalter, that the killing of Gordon by the defendant would not be denied. This was before the proof. Now after the State has exhausted its evi-

dence, I submit that the proof has not established the proposition.

The indictment contains two counts. On its face, want of knowledge of who killed Gordon is manifest. Without knowledge it is framed to meet contingencies. In the first count it is charged that Worrell killed him—killed him with a pistol—and that Bruff was by, aiding and abetting only. No sooner has the pleader drawn the charge than he reverses the accusation, and declares in a second count, that it was not Worrell who killed Gordon—that he was only present at the deed, and the killing was the act of another party. The indictment shows ignorance of the slayer of Gordon; and this ignorance is not dispelled, except by the statement of the defendant, which the State has made evidence.

1. My first proposition of law and fact is, that Worrell did not kill the deceased, as charged in the first count. The proof is to the contrary.

2. The second proposition is, that the second count is not proved. If Bruff killed the deceased, as charged, it is not proved that the defendant had knowledge of his design before the act, and agreed to aid and abet its perpetration; and that is essential to make him responsible for the act of another. There is no proof that he incited to the deed, so as to make him responsible as accessory before the fact; nor is it established that he was accessory at the fact.

3. If the evidence can be regarded as affecting the defendant with the homicide, the crime of murder in the first degree is not established against him.

This brings me to the distinction between murder in the first degree and in the second degree. The line is difficult to draw. It has not been drawn by any clean survey in our statute, and judicial construction has clouded the boundary. Our statute has not marked the division, nor run the line, as it was run in Pennsylvania, Tennessee and New Jersey; it makes the division at quite another part of the territory of crime; and yet our judges have been trying to follow the Pennsylvania, Tennessee and New Jersey surveys. What is murder in the second degree, in those states, may or may not

be murder in the second degree here; or to state the case more clearly, what is murder in the second degree in those states may be here only manslaughter, or justifiable or excusable homicide. Amidst this confusion, one thing is certain, murder in the first degree—capital murder—can't be made out of malice implied. Nothing but express malice proved as a fact, and so found by the jury, can make capital murder in this state. I do not now comprehend in this proposition a class of murder in the first degree made so and elevated to that degree by reason of being committed in the attempt to perpetrate a felony. That class stands by itself on independent ground; but it is certain, that of all other murders in this state, to constitute them capital, the element of express malice must appear in proof, and be found as a fact by the jury. We have no murder in this state which was not murder at the common law. In England, by the common law, no grades pertained to murder. The only line run through criminal homicide was that which divided murder from manslaughter; and all murder there was hanging or quartering murder. The code was a bloody code—too bloody for our people; and we changed the system at the call of reason and humanity. All murders are not alike in turpitude, tried by any moral test. If you, sir (speaking to a juror), are lying on a bed of sickness and prompted by an old grudge, masked in the disguise of sympathy, I approach you, proffer my assistance, gain your confidence, tender you medicine, five grains of arsenic (which I have substituted for twenty grains of calomel, the prescription of your physician), and you take it from my friendly hand, am I not, in the sight of heaven and earth, a different criminal from the man who, in the flush and transport of passion kills for bitter, burning words of contumely, spoken against the honor of his wife or daughter? Yet, by the common law, both of these supposed homicides are murder, and both capital. By our law it is otherwise. We do not live under a system which confounds distinctions, dictated as well by the enlightened reason, as by the instincts of man. We have divided murder into two degrees, and manslaughter four—adopting different penalties to each

grade of offense, and of murders known to the common law, and to the codes of Pennsylvania, and of Tennessee and New Jersey, some constitute here manslaughter—some excusable and others justifiable homicide. The *residium* left makes murder in the second degree.

You perceive in the reading one class of murders, which are declared to be murders in the first degree, because done in the attempt to perpetrate a felony. Now the defendant is not charged with such murder; and not being charged, he cannot be found guilty of such murder. I submit it as a legal proposition to the court, that to find the defendant guilty of murder in the first degree under that clause of the statute, he must be charged with murder done in the attempt to perpetrate, or in the perpetration of a felony.

It is not in the power of the prosecution to ask you to find a capital murder in this case, because of its being a murder done in the perpetration of a felony. If the fact were so proved, they could not ask it, for that is not the murder charged in the indictment. The legislature thought proper to provide, that every murder (not every killing) committed in the attempt to commit felony should take the rank of murder in the first degree, for that cause. The fact of the attempted felony is the fact which determines the grade of the crime, and it is therefore a material fact. I shall not trouble you with any question of variance between the proof and the charge, that is a question for the Court, after verdict, involving the fate of the prosecution; but, I shall ask the Court to instruct you, that in this case the prosecution can't demand at your hands the finding a murder in the first degree for such cause.

There is good reason for this. Your lives and liberty would be in peril if you could be found guilty of an offense not contained in the indictment found against you. The principle is not technical. It is a bulwark essential to innocence. You are entitled to a clear, distinct and specific accusation, that you may come prepared to meet it. The right is fundamental. The utmost that can be claimed for the testimony of the State is that Worrell had knowledge of the killing at the moment

it occurred. There is no proof establishing the fact that he knew of such design prior to the act, and participated in it. If he be a responsible being the evidence establishes the offense of larceny. The appropriation of the horse was subsequent to the death. If he counseled Bruff to fly after the deed, or aided him in his escape, feloniously, he might be held responsible as accessory after the fact—but he is not charged with that offense. To make him responsible for the murder one of two things must be made manifest beyond reasonable doubt. First, that Gordon fell by his hand; or, second, that he was killed by another, under an agreement by which he was to be present and aid in the accomplishment of the design; and that he was so present, and so aided, or was there ready to aid if need be, in the perpetration of the deed. It is indispensable to his guilt, as accessory at the fact, that he should have knowledge of the design to kill before the killing took place, and was present assenting to the act—that is, assenting that the act should take place. The learned counsel has not laid down the law to you on this point with his accustomed clearness. He slurred the legal proposition, and made presence alone, without previous knowledge of the design and concurrence in it, sufficient to render the prisoner guilty.

Presence alone is not crime; there must be knowledge of the crime about to be committed, and guilty concurrence in its perpetration. The Criminal Court of St. Louis once decided that presence at a riot raised a legal presumption that the party present was engaged in the riot, until he proved his innocence; but the Supreme Court stigmatized the doctrine by a single stroke of the pen—"This is not law"—and reversed the case.

The doctrine of the law on the subject of accessory guilt is clear, humane and reasonable; I wish you to understand it, as it is easy to confound it in the jargon of scientific words. The law proceeds on the immutable principle that a man is responsible, criminally, only for his own acts. But he may make himself responsible for the acts of another, by making that other his agent to act for him. If you sell your pork to

a firm of pork packers at Washington, and one of the firm only makes the contract with you, that contract binds every member of the firm, because each member has made every other member an agent to act for him. Thus the act of any one member becomes the act of all, and all are therefore responsible. That is partnership. And so there may be partnership in crime. If two men agree to commit murder, one to do the deed, and the other to stand by and help if need be, or to watch—if they agree in a common design, and assign the share of each in its execution, that is partnership, and that agreement makes each the agent to act for the other, so that the act of one is the act of both. But there must be an agreement to do the murder, and also presence at the murder, to make the accessory guilty of the murder. It is in such case only that the accessory becomes a principal.

I have told you that express malice must be found as a fact to make murder in the first degree under our law. We have no murder here which was not murder at the common law. We have not been guilty of the cruelty of making murder here of what was only manslaughter under the bloody and indiscriminate code of England, so that it becomes necessary for you to understand what did make murder at the common law.

I approach now a subject which touches every man in the land. The fate of the prisoner, however momentous to him, and to the parents who sit by him, sinks into subordination to the greater interest of society in the law of homicide. A false principle established in his case may involve a whole people.

By the common law of England, murder is defined to be "the unlawful killing of a human being, with malice aforethought, express or implied." The indispensable element of murder, at the common law, is malice aforethought. But malice was of two kinds, and either kind would make murder, and all murder took the life of the offender.

"Implied malice" is a constructive thing, a creature of the courts, not a fact proved in evidence, and found by the jurors, whose province it is to find facts; but an implied fact

—implied by the law—a legal fiction—a presumption, made in the absence of knowledge—a presumption made because of the absence of knowledge—a leap in the dark—a guilty guess as to how and why a killing took place, without knowing either the how or the why—an arbitrary fiat substituted for proof and demanding proof to overthrow it—a conclusion forced on the conscience of a juror which he must take for truth, and act on as truth, until the accused, by evidence, shall establish it to be a falsehood. Thus, on a charge of murder, the common law (as now expounded, however expounded by Coke and Hale in their day), not knowing the circumstances under which A killed B, nor the motive or cause of killing; not knowing whether he did it by misfortune or under the most grievous provocation, or to save his own life, or that of his wife or child—implied—presumed that he did it with malice aforethought—presumed that he was moved to the act, not by any just motive of his nature, but by the suggestions of the devil, and called on him to prove the absence of malice, or die on the gallows. That is the thing named "malice implied." Malice is a fact—a state or condition of the mind; and without that condition of the mind accompanying the act of killing, there can be no "murder," here, or at the common law. It is the indispensable thing, without which murder cannot be; and yet that is the very thing which the law implies did exist, although the law knows nothing of the actual fact. It says to the killer: "You had malice when you killed. If you can prove you had not, the law will take back its guess; but the guess shall stand for truth until you do disprove it." You perceive the call is made only when the State don't know the fact, and can't find it out; that it, when it is impossible for the defendant to disprove it.

Now, in this state it is wisely settled that "malice implied in the law" can't make hanging murder; and this is the distinction which I wish to impress upon you as of the last importance in the administration of the law of criminal homicide. You may send a man to the penitentiary by reason of this guess of the law imposed on your consciences, but you

can't send him to the gallows upon it. It is a libel on our nature to presume without knowledge that every killing is with malice. Although man is capable of cold-blooded assassination, yet naturally he recoils from the deed; and for one murder done in cold blood, there are a hundred killings the result of misfortune, or great provocation, giving rise to sudden passion, or the instinct of self-preservation. If any presumption must be made by the law, the presumption should be more in harmony with reason and experience. But why presume at all; why not probe every case by its circumstances, many or few, subject to the inferences of fact, which is the very province of a jury to determine. In the essence of the thing, it is an invasion of the function of a jury, and must be either useless or hurtful. If the presumption of the law is a reasonable and natural inference from the facts proved, the jury are better able to draw it, because they are supposed to be better judges of the motives of human conduct than the courts; but if, on the other hand, the presumption of the law is arbitrary, technical, artificial, for that reason it should not be drawn at all. It is cruel, as well as unwise, to make such presumptions. Call them truth, and by them determine the destiny of a human being. The invasion is, however, a successful one. Malice implied by the law has a legal existence in our law of homicide. The courts "proclaim it;" but they also proclaim you shan't hang a man upon it.

Two decisions—18 Mo. State v. Jennings, and 18 Mo. State v. Dunn—reverse what is sometimes supposed to be the decisions of the same court in the fifth volume Mo. Reports State v. Bower, and adopt the doctrine maintained by the dissenting judge in that case. Under those decisions, to make murder in the first degree, express malice must be proved, and found by the jury as a fact. It is not a thing, the existence of which is guessed at by the law; it is a thing proved—proved by the evidence which you hear; a thing found by you as jurors. The Court may tell you what the thing is, but the Court cannot find it. You are the only tribunal that can determine whether it is a thing proved—proved to your satisfaction. Your consciences are involved, and you can't shift

the responsibility upon others. It is a thing defined in the following words: "Express malice is, when one of sedate, deliberate mind and formed design, doth kill another; which formed design is evidenced by external circumstances discovering that inward intention; as lying in wait, antecedent menaces, former grudges and concerted schemes to do him some bodily harm."

Thus, jurors, you see what it is you have to find, and also what is the evidence of its existence. You have to find a fact —the condition or state of the mind at and before the killing, and the formed design of that mind; and you see also how that state of the mind, and that formed design must be exhibited. The "lying in wait," the "former grudge," the "previous threat," or the "concerted scheme to do the party mischief,"—these, or some of these, are the external circumstances which must appear in evidence, before you are warranted to find the state of mind and the formed design which make a killing capital murder. Both must precede the act; and neither can be implied by the law. It is your work to find both, and yours only.

You have all heard, perhaps, of the case of Jackson, indicted for the murder of Laidlaw in the St. Louis Criminal Court. There was much false clamor by thoughtless, inconsiderate men (who knew nothing of the case as it appeared in court by the evidence) touching the result of that case. I refer to it, not to deal with that clamor, ignorant as clamor is apt to be, but to illustrate the distinction in our law between the degree of murder, made by statute. In that case, as in this, there was no eye-witness to the killing; there as here, the circumstances of the killing were unknown. There, as here, the dead body was found on a road, called the King's highway, but not so great a thoroughfare as the Boonslick road. The evidence was all circumstantial evidence, as in this case. The State relied upon the circumstantial evidence to connect Jackson with the killing, and it was deemed sufficient by the circuit attorney for that purpose; and, in fact, it did not only connect him with the killing, but also excluded a killing by any other person. On that state

of facts the circuit attorney frankly admitted to Court and jury the offense would only be murder in the second degree, and he relied upon the subsequent flight of Jackson (who did fly and was arrested some months after in Iowa), and a former grudge, as evidence to lift the case up to the grade of murder in the first degree. He put the case to the jury on the ground, frankly and properly conceded, that a killing, under unknown circumstances, was only murder in the second degree, under our statute. In other words, a killing, under unknown circumstances, renders express malice impossible in proof. In such case there is nothing left but malice implied out of which to make murder at all; and implied malice cannot, as I have shown, make murder in the first degree.

In this case, the attempt will scarcely be to rely on flight, nor on a previous grudge. If the concealment of the body be urged to elevate the killing to murder in the first degree, I reply that our Supreme Court has declared in the case, in the eighteenth volume, before cited, that neither the secreting the body after the killing, nor the steps which may be taken by the offender to elude justice, are evidence of murder in the first degree. All such measures, taken after the deed, spring from fear of punishment, and from no criterion of the grade of the offense. The man who commits manslaughter may, from the same motive, take the same measures to avoid punishment.

The learned counsel was chary in laying before you the law of murder in this state. He did not even glance at the important distinction between its degrees—a distinction fraught with so much consequence. He did not run the line or mark the boundary; or if he did, he only confused the survey. The Supreme Court of Tennessee reversed a judgment of death in a case for no other reason than that the court below failed to tell the jury what was the distinction between murder in the first and second degree! That tribunal said a man's life might hang upon the failure. That was an omission; the court below forgot to run the line; but the court above said the forgetfulness was fatal to judgment.

The Deity gives life, but I agree, the government can take

it away. It is its most awful power; and because the power is awful, its exercise demands the utmost caution. Yes! Government may take life, but it should be fatal to the peace of any tribunal of government to take it by going on the wrong side of the line which marks the distribution of power. If the boundary be doubtful—if we are not certain of the legal territory on which we stand—humanity, the spirit of the law, justice itself, demands that the path of safety is to err humanely. Nor should we lend an ear to the voice of excitement, if that voice should counsel otherwise. It is the nature of excitement to confound the judgment, by substituting feeling for reason. The best of men are subject to this disturbing influence; but the spirit of our law will not submit that any man shall minister in this temple of justice who is under its power. To this end it provides a shelter from excitement—a city of refuge—not such as Moses created to protect the unhappy Jew from the avenger of blood, but a jury of twelve men, uplifted beyond the reach of the highest wave of popular commotion.

The means of refuge is change of venue; but the law takes care that excitement shall not pursue. How carefully did his Honor, who sits above you, probe each of you to find in the head an opinion, or in the heart a feeling against the prisoner. But no sooner are you sworn and impanelled, and charged with the fate of the accused, than the first assistant prosecutor, my friend, Mr. Coalter, rises to let in the disturbing elements of passion, which the law was so careful to keep out. He starts in passion, and touches as he goes every cord of feeling in the human heart. The deceased is "the noble son of a widowed mother"—"a whole people, roused by his lofty qualities, in the depth of winter are seen dragging the earth, shrouded by a deep snow to find the body." On the bare suspicion of his "taking off," they left their "comfortable firesides, amid the bitter inclemency of the season," and "turned out to a man"—they were "deeply roused" that one "so noble" should meet "disaster so foul"—they felt that a man "so good" should not perish without retribution on his murderers. Their acuteness took inspiration from in-

dignation so deep, and so universal, and Providence supplied what indignation could not furnish.

Thus *in limine* my friend would have your feelings prejudge the case. He would have you enlightened by the judgment—the foregone conclusion—of a "whole people," and awe you against any resistance of their decree. Into this sacred temple, whither Justice has retired, calmly, severely, carefully to weigh, to deliberate and mature her even judgment, my friend madly rushes and flings the passions of a multitude into the scales.

His classic memory alone ought to have saved him from the error. When Orestes, wet with a father's blood, fled from the Temple of the Pythoness, pursued by the Furies, they ceased their howl so soon as their intended victim embraced the Statue of Pallas; nor did they enter the Amphyctionic Council, which sat afterwards to decide the fate of the refugee. With the Greeks, Passions stood mute in the presence of Wisdom, and the genius of that people shut them quite out of the Temple of Justice. The spirit of our law is wiser than Minerva, and this tribunal is greater, more sacred, than the Amphyctionic Council of Greece.

To transfer the excitement of Warren County to this, is to defeat a statute, dictated by every sense of justice a noble commonwealth may feel. I do not pass upon "the people of Warren." I neither censure nor praise their excitement touching the homicide of Gordon. I only know that, worthy or unworthy, it has no business here—it is an alien element, out of place. It cannot come here legally, nor be brought here except at the expense of justice. This "excitement" was adverse to the purposes of legal justice; for that cause only the law sent the accused away from Warren County, to be tried in some spot out of the reach of a disturbing element. The law passed no censure on the people of Warren, nor do I, and this tribunal was not the forum in which my friend was called upon to stand forth as the champion of the people of Warren. His prowess was not challenged to any such effort, nor can he lawfully here seek to vindicate "a whole people" by dwelling on the noble qualities of the deceased.

The vindication and the eulogy are both wrong—both hurtful—both illegal—both disturbing elements which the law carefully shuts out from the consideration of Court and jury. I have no word to utter against the deceased—none. The law puts his character out of the reach of an assailant here—out of the reach of eulogy also. His character is not in issue in this cause. If that character was good, the law will not permit you to hear it, lest the memory of his virtues might awaken undue indignation; if bad, the proof of his crimes is also shut out, lest they might render you more insensible to justice.

Jurors, I may not deal with the motive which prompted my friend in his opening appeal, but I must deal with its effect. That effect was to kindle in your breast feelings unfavorable to a faithful discharge of duty—to lessen the weight of obligation, by rendering you less sensible of its claims—to make passion dictate a verdict which justice only can ever lawfully write. It is not for me to say what success attended the effort, but it is my duty to advise you against such influence. By every obligation you are under to God and man, it is your duty to resist every influence not sanctioned by the law you are sworn to administer. You hold in your hand the issues of life and death today as the peers of the prisoner; on another day, twelve other men, as your peers, may be clothed with the same awful power; or it may be your children shall hereafter stand to a jury of the country as the prisoner now stands to you; in each case the power held is a trust—an awful trust—sacred to Justice, to Justice only! If passion may usurp the power now, it may usurp it hereafter, so that the only security in the future, is fidelity now.

I cannot suppose my friend to be insensible to the immense stake humanity has in excluding passion from this tribunal; yet in the spirit—let me rather say, in the tendency—of his previous appeal, he exclaims: "Gordon had not a moment for preparation—not a minute; but was sent at once 'with all his imperfections on his head,' before the great tribunal of Judgment!"

Gentlemen, Mr. Coalter has not studied in vain the speech

of Antony over the dead body of Cæsar, and he is fresh from the interview of Hamlet with the "buried majesty of Denmark." If his policy were like that of the artful Triumvir, who sought to inflame the rabble of Rome to avenge the death of his friend, or like that of the murdered father, who stirred a living son to vengeance, his words were well matched to his purpose. But he is neither in Rome moving a fickle populace to counter-revolution; nor is he in Denmark, exciting a son to bloodshed. He is in a tribunal of law, which does not sit, "to sup on horrors," however artistically prepared. What legal consequences attach to the fact? Is it any measure of the offense, the time between the stroke and the death? Does the crime depend in any sort upon the length of that interval? If he had lived a month after the wound, would it have been less or more a crime to inflict it? A man, by accident or misfortune, kills his fellow—he does it on the instant—he is hurried before his Maker and Judge without opportunity to utter the word "pardon;" is it therefore less an accident—less excusable homicide under our statute? A man, in the heat of passion, under strong provocation, kills his adversary without a "moment's preparation"—which all of us need—nay, worse than that, kills him when there is blasphemy on his lips and in his heart—is the homicide less manslaughter for that? Does the legal criterion of crime ever depend, in homicide upon the condition in which the soul goes to judgment? There is but one answer to these questions. The law furnishes to you no means by which you can use the fact. You cannot legally value it. It is not put to you as jurors, as administrators of the law. It is addressed to you as men, who may forget under the dominion of passion the character in which you act. The law distinguishes between "that which belongs to Cæsar and that which belongs to God." He will take care of His judgment day, and dispense justice to all who appear at His bar, without our agency; and we know too little of the condition of souls at that dread tribunal to found human statutes upon it.

But Mr. Coalter was not content thus to present to you the case of the State, warmed as it was by his impassioned ap-

peal to hurtful prejudices. His work was but half done; it remains for him to shape the defense, and crush it in advance.

"I know," he exclaims, "there is not human power enough to deny the guilt of Worrell—it will not be denied; but the plea of insanity will be set up. Everything now-a-days is insanity. Drunkenness is insanity; eccentricity is insanity; forgery is insanity. Huntingdon was insane. Insanity is the broad, common cloak spread to cover crime."

Jurors, I am sorry to see a man of talents and high moral position, like my friend, pander to a popular prejudice anywhere, but the regret is deepened to witness such misdirection of power in this place. He should have left such work to the thoughtless, inconsiderate, and irresponsible portions of the press, whose daily function it is to interfere with the tribunals of justice. They know no better, and are but little more responsible than the stripling boy who explodes a magazine with a random firecracker.

There is a want of historical accuracy in this compendious statement. Insanity is a rare plea in our judicial annals. In a practice of near thirty years, this is the third occasion on which I have presented insanity as any part of the defense. I claim to be somewhat familiar with judicial proceedings at St. Louis, and in fourteen years I do not believe ten cases of pleaded insanity can be culled out of all the homicides which have been there the subject of criminal adjudication.

But that is not the greatest error of the statement. The error is not statistical that I must find fault with—it is above any question of numbers, it is moral, philosophical, legal, judicial error. What if the plea of insanity had been put in in every trial of every homicide done in the state, since the criminal courts were first opened, and every plea found to be a false plea? Is insanity therefore no defense? Is the plea in this case therefore bad? Are you therefore to banish from your consideration all proof of mental disorder, and erase from the conscience the principle upon which the responsibility of man to government and to God is founded? How are you instructed in your duty by this sneering reference to past

annals? Was it that inoculated with the virus of prejudice against the plea, you should look hatefully upon the proof of it? Or were you to be so blinded by this cataract of denunciation as not to see the defense at all?

If juries have let some men escape under the plea of insanity, are you therefore to hang a madman as a compensation to baffled justice? Are you to forget your oaths and stifle your consciences because other juries have been careless of legal obligation? "Attend to your own business" is a wise maxim of private life, and in the jury box it becomes a rule of perfect and infinite obligation. Ah! Mr. Coalter remembers that Worrell's case may become yours or your children's, and be careful how you counsel a precedent, the reaction of which may strike down all you hold dear. I know of no deeper disgrace which may come upon this or any other tribunal of justice, than it should send an irresponsible human being to the gallows. Indignation against crime is a virtue; but indignation may become crime, if we suffer it to make us blind to just distinctions. The very atrocity of crime, which naturally awakens indignation, should also beget inquiry touching the sanity of the actor. Humanity demands this and experience justifies the toil. The man who would shirk this inquiry, or deride it, or carry on a crusade against it or sneer it out of court, has not in him the spirit of the law, and is not fit to be its administrator. The law, by the very definition of murder, makes the investigation a necessity. It is essential to the crime that its perpetrator should be sane. "Murder is when a person of sound memory and discretion unlawfully killeth a human being, with malice aforethought, express or implied."

"First, it must be committed by a person of sound memory and discretion." Jurors, that is the law of this land. You cannot find Worrell guilty of any crime unless you find him to be of sound mind and memory. The law makes his sanity one of the essential issues of this trial. Yet what have you not heard and read against the plea of insanity in "murder cases"—that recent invention, that modern device of the mid-

dle of the nineteenth century, devised by rampant guilt in fraud of the gallows and the penitentiary!

A man may smile at this folly as the senseless cry greets him on the street, or he reads it in the expression of thoughtless type, hastily put up to sustain a nine days' wonder, but he may not smile if he sees this stupidity come into court decently dressed, and taking its seat on the bench, at the bar or in the jury box.

Silly individuals sometimes lift the same hue and cry against the "plea of alibi," because "it has sheltered scoundrels," and hurried forward by a blind fury, they would deprive an innocent man of the only certain affirmative proof of his innocence, which can ever be made by evidence.

It may help these short-sighted ones to learn that "alibi" and "insanity" are not "pleas;" that the former is "proof" of the innocence of the accused, and the latter "proof" of his irresponsibility to human judgment; and this "proof" in each case, is directly within the legal issue made in every case of accusation. To illustrate: If one of these simplifiers should be charged with murder, it would be incumbent on the State to show he was present at the place of the homicide, at the time of the killing, and therefore it is within that issue for the simplifier to prove he was elsewhere at that time. That is the "plea of alibi," and if established by proof, the innocence of the short-sighted one is affirmatively established.

I trust that "alibi" will survive as a protection to the innocent, if for no larger reason, at least for the benefit of these inconsiderates; and as to that other plea, which goes to the question of human responsibility, I know of no class of men more deeply or personally interested in its maintenance.

Gentlemen, the learned counsel, aware that he could not keep you from entertaining the defense of insanity, if presented, resolved at last to simplify your labors. He suggests a method of investigation, which, if adopted, will relieve you at once of all analysis, all thought, all classification, all painstaking toil. You will be able to reach by a single bound, without a mental process, a conclusion, upon which may hang the destiny of a human being. You are to determine insanity

by intuition, not by reason. You are to cut yourself off from the influence of all knowledge gained by others after long study and painful examination of the human mind in ruins, and trust to instinct. Your own unenlightened reason even is not to guide you. It is a question only of eyesight! As the afflicted were "to look on the golden image and live," so you are "to look and determine." This is simple and summary, and, one would suppose, final, too; for if error should happen, by an accident, to get in the process, there can be no correction. The counsel exclaims, "Why resort to books on insanity, to works on medical jurisprudence, to the opinions of the learned, etc., for the tests there laid down? Does not every man know an insane man, when he sees him?"

Jurors, if this declaration had come from another quarter —if it had been an emanation from the simplifiers, it would have created no surprise, for their hostility to both learning and knowledge is both natural and logical; but from the lips of the counsel it may well fill with astonishment all who know him. When before did he ever start a crusade against science, or pander to the pride of ignorance?

The vulgar idea of insanity does conform to the proposition advanced. Raving maniac or utter imbecility, violent and incoherent jargon, make up the vulgar conception of madness, and hence almost every case of feigned insanity takes the one or the other of these forms. The insanity that cannot be seen at a glance is rarely assumed. If the disease is not patent on the surface, the simulator avoids it as unsuited to his purpose. If it be latent, difficult of detection, requiring, like any other secret inflammation, skill and knowledge, and patient examination to find it out—if, especially, it be of that type, which most resembles crime, the criminal is sure never to feign it. He would as soon forge a note, a bank note; which, after the most successful imitation, would not be regarded as a bank bill by anyone.

If anything be certain, in our knowledge of the human mind, it is that insanity, in some of its phases, can be detected only by a severe scrutiny and a patient examination, conducted with a skill enlightened by long experience and famil-

iar with its manifestations. If there be one subject within the circle of disease which more than another tasks and taxes the human mind, it is the subject of insanity. This is the opinion of every author who has written upon it, of every medical jurisprudent, of every keeper of lunatic asylums, of every man who professes to have learned by study anything of the manifestation or phenomena of mental disorder, without exception; and yet my friend exclaims, "Does not every person know an insane man when he sees him?"

I wish it were so! I wish the most perplexing as well as the most important of all metaphysical inquiries, upon the proper solution of which life, liberty and reputation often depend, could be infalliby answered by a look. "It is a consummation devoutly to be wished;" but I fear it is not in the order of Providence.

A very distinguished jurist of Pennsylvania, the late Chief Justice Gibson, while deploring the ignorance of English julges and English authors on the subject of insanity, and denouncing the special unfitness of the House of Lords to determine the legal rules and psychological tests of the disease, uttered the hope that the day was not distant when insanity, in all its phases and types, would be as well understood, and as successfully treated, as ordinary bilious fever. His reliance, however, was not based upon the magic of a book, the panacea of a glance, but upon the combined observations and scientific toil of the finest minds of England, France, Continental Europe and America, directed patiently and watchfully to the detection and classification of the phenomena of the disease. The age is favorable to the investigation. The science of insanity is emphatically a science of observation, and no past age has furnished the facility for observation provided by the infirmary, the hospital and the asylum of this country. If the prediction of Justice Gibson shall be verified, it will be because the simplifiers are shut out from the investigation, because the difficulty of the attainment is admitted by those engaged in its accomplishment, because every step of progress will be a step of caution, in order that it may be a step of safety. No investigator will make real

advancement in this department of science who is not impressed with the great truth that "man is wonderfully and fearfully made."

Insanity detected by a look! There is feigned insanity, so like the real as often to baffle enlightened investigation. There is concealed insanity, so crafty and subtle as to deceive the best informed keepers and physicians of lunatic asylums on a question of discharge. In other words, the insane patient knows his disease, knows the indications of its existence and knows how, by the exercise of wisdom and the force of will, to deceive his keeper and pass for sane. He knows how to suppress the indications of his insanity, and successfully feigns sanity. This is the history of insane hospitals; but you were not exactly prepared by the opening speech of the prosecution to believe it.

At the present term of the St. Louis Criminal Court, before Judge Lackland, a man was tried for murder and convicted. He was defended by counsel of highly respectable position in their profession. The jury box contained as much intelligence and discrimination as our panels there ordinarily furnish. The counsel were employed by the prisoner, not assigned by the Court. The trial lasted several days. The defense of insanity was not relied on—no preparation of the case was made with any such issue—no evidence brought to sustain it. The counsel saw no indication of mental disorder in their client—nothing to create a suspicion of insanity. The trial began and ended without allusion to that modern invention, the plea of insanity, so odious to justice, and so offensive to this prosecution. The verdict was guilty. A motion for a new trial was filed by his counsel and overruled on all the grounds set out in the motion; but the Judge, on his own motion, set aside the verdict, because the defendant was insane when he committed the homicide! The Court ordered a committee of six physicians to go to the jail, and after examination of the prisoner, to report in writing his condition as to sanity. They did so, and pronounced him sane. The Judge told them they were mistaken and ordered a re-examination. The result of repeated examinations was

because every judge who has been on the bench in England within the last two hundred years would prescribe the favorite common law remedy of hanging for the disease; melancholy, because of a soul conscious of its deed, and struggling in vain to resist the impulse it abhors.

Gentlemen, the legal test of insanity laid down by the prosecution is not law. Our own Supreme Court has repudiated it in the case of Baldwin. Knowledge of right and wrong is possessed by the sane and the insane. I grant it was for several hundred years, the only test for the common law. The obstinate ignorance of the English Bench yielded to the genius of Erskine, what it denied to the experience of lunatic hospitals, and granted in Hadfield's case the existence of insane delusion, under cautious limitations. The existence of "irresistible insane impulse," known wherever insanity is known, is yet, I believe, unknown to the common law. That system of criminal jurisprudence left out one part of man's nature—the noblest part—the will, the essential element of responsibility, here and hereafter. What if we do know "right from wrong," if we have not the freedom of will to choose between them? Without this capacity our acts can be neither vicious nor virtuous. Without volition, we are no more responsible for our action than the earth if imbued with reason would be for its revolution around the sun.

I shall appeal to this Court, and I shall not appeal in vain, to instruct you that "the power to distinguish between right and wrong," is not the legal test of insanity in this state. Our law recognizes an insanity in which this knowledge exists as a complete exemption from human punishment. This legal issue must be met by you, if not by the prosecution; humanity and law demand this much at your hands.

Jurors, I have felt it to be my duty to try at least to free your minds from some errors, which are logical results of the opening speech of the prosecution. I have been thus moved as well by my interest as a citizen as by my duty as an advocate. The law of murder in this state has been presented to you without any reference to the element of malice; the law of insanity has been blurred in your presence, and misstated.

You have been led to believe that no difficulty can attend the investigation of either subject, that your pathway in both will be as "easy as the road to mill," and that you may therefore dismiss from your minds all anxiety, all perturbation, all solicitude, touching the rightful exercise of the power of life or death, now committed to your hands. I must say as respectfully as I know how to utter the words, this is "bad advice." To yield to it is at once a crime in morals and a transgression of law. No good man ever sat in judgment on the life of his fellow man, without feeling deeply his responsibility, and to listen to such counsel is to lose the sense of obligation. If I thought you agreed with the counsel as to the simplicity of the issue of insanity, as to the very summary way in which all such inquiries should be despatched, I should scarcely trouble you with the mockery of an investigation. Because I do not think so, I shall by the defense make it your duty to investigate evidence of the mental disorder of the prisoner. In this investigation the first step is sure. It is certain that we are not dealing with a case of feigned insanity; for no man ever yet feigned a mental disorder like Worrell's. The first step is safe, whatever may be said of those which must follow. The investigation is full of difficulty, and I would therefore relieve it of as much embarrassment as may be consistent with fair advocacy.

Worrell is no raving maniac, nor is his disease imbecility, much less is he an idiot. We may safely avoid those forms of insanity as classified by authors, as not calculated to help us in our present inquiry. What then is the nature of his insanity, if he be insane? His disease is of a nature which presents the complication of epilepsy with irresistible insane impulse. Irresistible insane impulse is called "homicidal insanity," "moral insanity," "monomania," "mania without delirium," by authors according to their respective ideas of descriptive epithet. However named, it is the same thing and consists essentially in the loss of the power of volition without any very perceptible lesion of the intellectual faculties. The perversion appearing most in the moral faculties, the disease assumes necessarily a resemblance to crime, and

this aspect of it necessarily creates the difficulty of the investigation. How shall we distinguish between crime and insane impulse? May we not mistake one for the other? Is there not danger that a mistake may be of grave consequence, on the one hand to give impunity to guilt, on the other to put to death the innocent? Yes! there is difficulty, there is danger, a mistake is easy, we may confound two things as opposite as heaven and hell; and acting upon the error you may bring a result which shall give color to Voltaire's exclamation: "The world is the theater of only mournful tragedies." Certainly, there is difficulty and danger, but how shall this knowledge move us? Shall we, therefore, not investigate? Shall we condemn without inquiry, lest upon inquiry we might make a mistake? That is sorry logic, fit only for the callous and the cruel. If we may err upon inquiry, we must err without it.

But, after all, what is the nature of the difficulty supposed peculiarly to attend the investigation of this type of insanity? You are to determine whether there was the power of self-control in the given case. The same question comes up in every case of manslaughter. In all cases in which you have to distinguish between murder and manslaughter, the turning point of the inquiry is the question of self-control, the dominion and sway of impulse, over the calmer reason.

As to the disease of epilepsy, its connection with insanity is conceded by all authors. No man would hold the epileptic responsible for any act committed in a paroxysm of the disease, and all agree that the tendency of the disease is to permanent insanity. Repeated epileptic strokes batter out the mind altogether as in imbecility, or they leave a state of mental irritability and nervous disorder, strikingly analogous to the phenomena of "moral insanity," or mania, most apparent in the affective faculties. I say most apparent, because I am satisfied that in all cases of insanity the whole nature of man is hurt. Any long-continued disease of the intellectual faculties must involve to some extent the moral faculties, and vice versa, the intellect cannot long escape the influence of a perverted moral nature. The combination of homicidal impulse and epileptic disorder is frequent. I shall

after the close of the evidence refer you to many authors. At present I read to you from Ray's Medical Jurisprudence of Insanity, section 381:

"To determine exactly the mental condition of an epileptic at the moment of his committing a criminal act is often a difficult task. It may have taken place in the absence of any observer, in a fit of fury that rapidly passed away, and which perhaps may not have followed any previous paroxysm; or the accused, though subject to the disease, may not have recently suffered an attack, and may have appeared perfectly rational to those around him. The suspicion that the accused was deprived of his moral liberty when committing the criminal act would be strengthened if the paroxysm had been recently frequent and severe; if one had shortly preceded or succeeded the act; if he had been habitually subject to mental irritability, or other symptoms of nervous disorders; and by those circumstances generally which would lead to the same conclusion were the supposed disease a form of moral mania instead of epilepsy. (See page 217.) Cases of this kind should be closely scrutinized, and where the accused has been undeniably subject to epilepsy he should have the benefit of every reasonable doubt that may arise respecting his sanity. Less than this common humanity could not ask; more even has sometimes been granted under the operation of milder codes than the English common law."

To show you the more general indications of that other form of insanity to which the author refers, and with which epilepsy is often complicated, I read section 217, Moral Insanity:

"In nearly all the criminal act has been preceded either by some well marked disturbance of the health, originating in the head, digestive system or uterus, or by an irritable, gloomy, dejected or melancholy state; in short, by many of the symptoms of the incubation of mania. The absence of particulars in some of the cases recorded leaves in doubt how general this change really is; but a careful examination would no doubt often, if not always, show its existence where apparently it has never taken place.

"II. The impulse to destroy is powerfully excited by the sight of murderous weapons, by favorable opportunities of accomplishing the act, by contradiction, disgust, or some other equally trivial and even imaginary circumstance.

"III. The victims of a homicidal monomania are mostly either entirely unknown or indifferent to him, or they are among his most loved and cherished objects; and it is remarkable how often they are children, and especially his own offspring.

"IV. While the greater number deplore the terrible propensity by which they are controlled and beg to be subjected to restraint,

a few diligently conceal it, or if they avoid it declare their murderous designs and form divers schemes for putting them in execution, testifying no sentiment of remorse or grief.

"V. The most of them having gratified their propensity to kill, voluntarily confess the act and quietly give themselves up to the proper authorities. A very few only, and these to an intelligent observer show the strongest indications of insanity, fly and persist in denying the act.

"VI. While the criminal act itself is in some instances the only indication of insanity, the individual appearing rational as far as can be learned both before and after the act; in others it is followed or preceded or both by strange behavior if not open and decided insanity.

"VII. Some plead insanity in defense of their conduct or an entire ignorance of what they did; others deny that they labored under any such condition, and at most acknowledge only a perturbation of mind."

There are many helps provided by men who have studied the mind in ruins for those less informed, whose duty it is to pass upon a question of human responsibility. They are called "tests" and in scientific language the term is proper and conveys a definitive idea well understood, but it would be a great mistake to treat these "tests" as infallible or even certain indications. Out of the exact sciences, approximations are in general the best instrumentalities of the scientific. I do not know one infallible test of insanity, nor one infallible test of the age of a fœtus at the delivery, yet in both cases the application of all the helps provided by the learned to the circumstances of the particular case will ordinarily reach moral certainty.

If I were called upon to designate the standard by which I would measure insanity and the evidence best calculated to establish its existence, I would say that the highest proof of it is the testimony which establishes a sudden, violent and continued departure without external cause from the state of feeling and modes of thinking habitual to the individual when in health. In other words, a violent sudden change without adequate outward cause from the normal standard of character. A pious man does not in a moment become impious; the honest man does not suddenly become a thief; the man of avarice does not instantly lose his love for money;

the kind and gentle do not in a day grow hungry for blood. Such violent and sudden antagonisms are the surest evidence of mental disease. The law of evidence permitting proof of good character in criminal cases is founded upon this philosophy of man's nature, and it is a true philosophy. It is introduced as proof that the crime was not committed, not to excuse it. If piety, honesty, gentleness may perish or turn to their opposites in a moment, if they cannot furnish any resistance to the influence of evil, are they worthless? It is not so. There is a *vis inertiae* in the moral as in the physical world by which virtue as well as a stone has a tendency to remain in the place; and this law presents us with one of the most unerring guides to truth.

I shall ask you to try the prisoner's mental condition by the standard of his normal character, such as the evidence may establish. I shall endeavor to make you familiar with his history from boyhood up to the present time, and I invoke your candid attention to every fact which the evidence may disclose of epileptic fits or uncontrollable insane impulse. In one or both of these forms, if at all, the insanity of the prisoner will be manifested.

Gentlemen, I have said what it was my purpose to say in these opening remarks, but I may not take my seat without some reference to the triumphant inquiries of my friend so put by air and tone and manner as to imply not difficulty only, but impossibility in the answer.

"Do the insane ever act from motive?" "Do the insane ever steal?" Yes! I answer to each question and to both. Yes, the insane act often upon motive, and the insane steal. Blood does not offer the only attraction to the insane. They steal and commit arson as well as murder; the light of burning houses gives ecstacy to the insane, in some modifications of the disease, and in others they can't keep their hands from picking and stealing. There is not a respectable author of this century on the subject of insanity who does not sustain the fact. While I thus answer it is nevertheless true that "motive" is a consideration of value in our inquiry as a test of insanity. The apparent motive deduced

from the appropriation of the property of Gordon is the only fact in the cause which bears with any force against the defense of insanity in this case. I shall not omit the topic of motive when I come to the argument of the case.

THE WITNESSES FOR THE DEFENSE.

Hartford T. Clark.[10] Have known defendant since September, 1852, when he enlisted in the United States Army. First saw him at Carlisle Barracks, Pennsylvania. He was then a member of B Company, First Dragoons. He left the army in New Mexico; discharged by order from the Secretary of War. I afterwards saw him at Fort Leavenworth in August, 1855. He had re-enlisted and was a private in Company H, First Cavalry, under Captain Newby. Was afterwards promoted to orderly sergeant of the company, and held that station at the time he last left Fort Leavenworth, January, A. D., 1856. Worrell had the reputation of being a peaceful, quiet man, when not under the influence of peculiar causes of excitement. He was very excitable — more easily aroused than most men. Of very sociable disposition; more inclined to joke than to quarrel. Could readily give and take jokes of the roughtest character without seeming to become angry except when under some excitement. He was frank and unsuspicious; free and open in his demeanor and fearless. Generous to a fault; rather reckless in expenditure. Punctual in the discharge of his duties. More than ordinarily orderly in all his business. He was deemed a very good sergeant by both officers and men. There was nothing vulgar or low-bred in the man, but his manners were quite refined. He was not dissipated or dissolute in any of his habits; was particularly observant of the etiquette of the army. Always neat and cleanly, and was never blamed for want of propriety by his superior officer. In July, 1853, while Worrell was attached to Company B, First Dragoons, he was taken sick at Fort Atkinson and was out of his mind several times; would not recognize, though well acquainted with me. In December, 1855, at Fort Leavenworth I was called up one night to visit him, and found him quite deranged, and no one could quiet him but me till the doctor was called and administered something to him. At the first-mentioned time Worrell made no demonstration except to stare wildly around and work his fingers. He would speak to no one, or notice anything around him. At the second time he tore his hair and called loudly for me, and would not keep quiet unless I would talk to him.

H. Miles Moore. Worrell came to my office in Weston, Platte

[10] The evidence of Clark, Moore, Cavendish, Curran, Raisin, Dunn, Ringold and Urghart was in the form of depositions which were read to the jury.

County, Mo., in the spring of 1855. Told me he was a private in Company B, Dragoons of the U. S. Army. Desired me to make an application to the Secretary of War for his discharge from the army. Appeared to be in trouble, and expressed himself in very singular language, so much so, that I thought that he was laboring under a strong mental derangement. Have seen him several times since. When not depressed in mind, he was a very sociable and companionable gentleman, well-bred, and had evidently been accustomed to much more refined society than offered itself in the mess of a private soldier in the regular U. S. Army. When he first came to see me, after stating his case fully, I remarked that I found his case was a hopeless one, as I feared that the Secretary of War would not discharge him. He then remarked to this effect: That there was no use talking; he wished to God he had never been born, and that if he could not get out of the army honorably he would not desert, but he would get himself out for good. Tried to pacify him, as I feared he meditated some evil to himself. Have not seen him for about six or eight months past. He was always very neat and cleanly in his dress and appearance.

Frederic A. Cavendish. First knew Worrell in August, 1855. He was a sergeant in Company A, First Cavalry, at Fort Leavenworth, and was afterwards promoted to orderly sergeant. He was a very peaceable and quiet man when left to himself and not under peculiarly exciting influence. He became very much excited on several occasions. He was easily thrown off his guard and was at all times very excitable and irritable. He was of an affable and sociable disposition; could give and take a joke with as little offense as any man. He was a man of frank and manly manners, and in all his bearing free and open—more so than most men. Was liberal and generous; he was neat in his dress and deportment, keeping himself and horse always in trim and order. Was always prompt in the discharge of his duty, and strict in his discipline of those under him. Was considered by every person at the post as a superior orderly sergeant. His manners were refined; nothing low or vulgar; habits temperate, and he always commanded the respect of those around him. On one occasion he was lying ill in his orderly room, and there was a man of H company and some Irish citizens disputing at the foot of the stairs, making a great deal of noise. He rushed out of the orderly room with a loaded revolver in his hand, cocked, and said, if you do not quit making such a damned noise, I will blow hell out of you; he appeared to be unusually excited, almost frantic with rage. He presented an unusual appearance and seemed to me to be insane. At one time I was with him in the orderly room and there were two women came up into the room whilst he was lying in bed. He had been for several days very unwell. He made use of the words, did you see that picture on the wall? Cannot say whether he addressed himself to me or the other company present. He said, I drew that picture today. How do you like it?

There was no picture there. He was working his fingers without any apparent object, and soon commenced pulling the hair out of his head. His eyes were wandering, and he seemed to me evidently to be out of his right mind. He had only been sick two or three days. Then, on the only two occasions on which I saw him in this condition I was a member of the same company. He often showed me his private correspondence; frequently showed me letters from his relatives and from a young lady, a Miss B. He told me that some young man had forged a letter purporting to be from the young lady's father, saying in the letter that he wished him (Worrell) to have nothing more to do with himself or family; and he said, when he received the letter, it excited him so much that it threw him into fits; and he occasionally had fits from that cause. His mind seemed to be absorbed in the subject of his love affair; he often talked about it, and frequently, when talking on that subject, he became unusually excited. My opinion is that his occasional derangement was from the cause of his love affair, and not from sickness.

Dr. William H. Curran. Live in Kentucky; became acquainted with Worrell in the spring of 1851. His character for peace and order was very good, so far as I observed myself or heard others speak. Could not undertake to say that he was insane. He was sometimes eccentric in his conduct, and I have heard his eccentricities made the cause of remark. On one occasion I was called to see him professionally, when I found him in a violent epileptic convulsion. Was at that time and am now a practicing physician. Can recollect no occasion where such manifestations were made, except the epileptic convulsion before mentioned, when he was (as is generally the case) for the time being affected in mind. The convulsion was a very severe one, and I was then informed by his parents that he had been afflicted in a similar way before, more than once. He was generally polite, kind and liberal; he was remarkably fond of ladies' society. Am a graduate of the Ohio Medical College at Cincinnati.

Robert W. Raisin. Have known Worrell for 25 or 26 years. His general character was good; was very fond of the society of ladies and was a general favorite; a remarkably polite man and very respectful in his deportment; very liberal and kind to his associates; neat in his dress and sometimes over nice. Having known him since he was a child, always considered him a wild and eccentric youth up to manhood; at one time about, 10 years since, I was going over Chestertown Bridge, Md.; he saw me coming in my carriage and drew up the draw, which placed me in great danger, and at the same time I knew that he loved me as the warmest friend, and had not the slightest design to injure me. This is one of his common freaks of mind most mysterious. He has manifested at times unexpected and uncalled-for turbulence in movement. I have seen him on frequent occasions where it has apparently appeared to me there has been unsoundness of mind. I don't know to my knowledge whether he has been afflict-

ed with fits of any kind. Knew several attached to his family that were crazy. I have known his father to be a very eccentric man. I have understood it to be current in the neighborhood that Mr. Worrell attempted to commit suicide; was at times so changeable that he changed his mind from the study of divinity, under Bishop Kent of Indiana, to medicine, and from one profession to another without any apparent reason whatever. Have understood from common report that his grandmother was eccentric on the subject of nicety. Have known several relatives of the Ringold family who are insane. Professor R. W. Ringold of Chestertown College was insane for several months. His brother committed suicide, and one of his nieces is now in the hospital of Maryland.

Daniel Blocher. Knew Worrell in the years 1848-49, whilst residing in the town of Cumberland, Allegheny County, Maryland. He was then a wayward young man, without stability of purpose, and was not considered as responsible for his conduct generally. His ambition seemed to soar above his ability to do what he would sometimes undertake. He lacked discretion and caution. He had the head of the man and the mind of the boy. Dr. Worrell, the father of Edward, was a very eccentric man whilst he resided in Cumberland.

James Dunn. I was introduced to Worrell in Baltimore, at the office of Robert W. Raisin, and had considerable conversation with him in regard to the several new states now settling—Kansas, Nebraska, Oregon, etc. He became much excited on that subject and inflated with a considerable amount of gas. Found that I could not continue my conversation with him any longer, and was requested by Mr. Raisin to stop the conversation. He must be an insane man; there being no difference of opinion on the subject of the conversation, as we concurred in opinion, and therefore there was no cause for excitement.

Samuel Ringold. Have known prisoner from his infancy, though not continuously, in consequence of not residing in the same place. He has at times shown uncommon stability and an unexpected, uncalled-for turbulence of movement and hasty impetuosity; he has evinced no manifestation of insanity except an occasional wildness and extreme excitability. I do not know whether E. D. Worrell has ever been afflicted with fits of any kind. I do not know that any Worrell was crazy except a report that Dr. E. H. Worrell once attempted to take his own life by laudanum. Have heard that Dr. Worrell, father of defendant, is rather eccentric; he was thought to be more than eccentric when he suddenly, without explanation, abandoned divinity after having prepared himself for ordination under Bishop Kent of Maryland. Defendant's grandmother was remarkable for nicety, but to what extent I do not know. It is not believed that every branch of the Ringold family has presented some subject of mental aberration. The branch near Chestertown has. As to the Eastern Neck branch, one of the family shot himself and one has been insane and is

now in the hospital. Don't know as to the Fountain Rock branch.

George Urghart. Had some personal acquaintance in 1855 with Worrell; boarded in same house with him and his father and mother. He occupied part of my dental office and was constantly there during office hours and paid every attention to his business. His manners and conduct in his profession exhibited skill. Had full confidence in Worrell, who often acted as my agent in collecting money. Worrell was frank and polite. He was an attendant on religious services, and have no knowledge of his ever resorting to vulgar or unbecoming company, taverns or tippling houses. He was fond of the society of the ladies of the village; did not associate with the young men of the town. Was a man of truth.

Marcus Wright. Now reside in St. Louis; knew Worrell at Portsmouth, Ohio, in summer of 1849. He was in employ of Wm. Elden, a dry goods merchant. He was well liked there by the people; a member of the Baptist Church and also engaged in the Sabbath School as teacher. Have seen him take charge of a class twice. Never saw anything about him to show but what he was perfectly sane. Don't know of his having had any convulsions or fits there; he was fretful, that was all I could see; next saw him the day after I arrived in St. Louis in the jail, recognized him, and he me, without my mentioning his name. Seemed to be very much pleased at seeing me, so much that he called to his father, here is Mr. Wright.

January 26.

James F. McGee. Reside at St. Louis; previously lived at Baltimore. Know Worrell; first saw him at Vincennes last winter, at the railroad depot, next in the cars; was going to Baltimore. Worrell introduced himself to me. He asked me the best route to Baltimore. He had on a brown cloth cap, an overcoat, dark colored, and dark pantaloons; a black frock coat under his overcoat. He had a watch and vest chain, and several rings on his fingers. He had beard and mustache but no whiskers. The hair was unusually long. Don't recollect what time we left; took cars for Indianapolis and remained there all night. Worrell got in same cars with me and wife. He brought on a pair of saddlebags, which he carried in the cars; he had no trunk. At Indianapolis he put up at a public house just opposite the depot, at which I put up. We started from there the next morning; he had on then blue military pantaloons. Next night we reached Crestline, where we stopped all night. We put up at the same hotel. We left the next morning. He still kept the saddlebags with him in the cars. At Pittsburgh I remarked I would go to a store and buy a shirt and get shaved. He said he believed he would do the same; that as he was getting in the neighborhood of his friends he would look better for it. Told him he would look better for having his whiskers trimmed. He got shaved and had only his mustaches taken off altogether. When he got up from the chair I told him, if I had not seen you set down there, I should not have

known you. We arrived at Baltimore Sunday evening. Worrell stopped at Mrs. Elzie's on Second between Gay and South streets, a private boarding house. He told me he had formerly boarded there. Next morning I met him on Baltimore street—myself and a friend. Introduced prisoner as Mr. Worrell. Told him we were going to take a glass of ale and asked him to go with us, which he declined. The only liquor I saw him drink during the whole trip was a glass of ale at Pittsburg. Next saw Worrell at Dover. Capt. Cousins and Mr. Harrow of Vincennes went with me from Baltimore to Chestertown first and thence to Dover. Worrell had told me he was going to Dover; that he had some friends near there. When I next saw Worrell he was in custody of the officers on the road coming up from the hotel to the depot about 1 o'clock in the morning. Was not present at the arrest. During the time until his arrest I thought he acted very strangely. He made himself generally conspicuous on the whole route. He would sit down and converse with any person without any introduction, gentlemen and ladies both. At that time I had heard nothing about the death of Gordon. First learned of the pursuit after him in Baltimore. I saw him at the jail in St. Louis. Also saw Bruff.

Otis M. Messick. Am on the recruting service in St. Louis; am a corporal. Worrell was an orderly sergeant in Captain Newby's Company. Saw him while we were on the plains; afterwards also at the fort. Worrell's moral character, standing and reputation were good. It required that, or he would never have held the position he did. He deserted; don't recollect the month. One time when on post with order to let no one pass without the countersign, I was armed, if I remember right, with my sabre and loaded carbine (a cavalry gun). After taps Worrell came towards my post. I hailed him with the words, who comes there? His answer I think was, a friend. I commanded him to halt in the words, halt! friend. He advanced —never halted at all, and said, good evening, sentry, or sentinel — don't recollect which— and continued to advance. Did not wish to shoot him. I took on myself the responsibility not to do so. I was not reported for it. Don't suppose anybody knew it except Worrell and me. By my then orders I had a right and it was my duty to fire on him as he continued to advance. After he deserted his hat was found on the ice. Some thought he had deserted, others that he had drowned himself. Never saw Worrell have any epileptic fits. Did not know Bruff.

Cross-examined. Have known other persons advance towards sentinels, and when known the sentinels would let them pass sometimes; when sentry is well acquainted they sometimes let a friend pass and assume the responsibility. It is wrong to do so, but it is sometimes done. It is strictly his duty to prevent any one passing. They don't always do their duty. In time of peace this is more common. At this time there was no danger of enemies.

Edward Lane. Reside at Fort

knowing it. I don't recollect all the persons who were present at the time of his illness in the orderly room. A short time after the doctor gave him medicine he became calm. Don't know what he gave him. I don't know what caused it. Can't swear it was not produced by liquor. Am no physician and can't swear anything about it. At the time of the controversy between the soldiers and citizens, Worrell said something, I don't recollect what. He was a very resolute man. Did not know but what he might shoot. There was loud noise and talking; what it was I did not know, but it was something to the effect to go away and make no more disturbance. We very quickly left as soon as we saw the pistol. Have seen Worrell on parade where he acted very strange as a non-commissioned officer. Worrell was first sergeant. That office is very important. He is secretary and keeps all the accounts of the company. He discharged the duties of the company up to the time he deserted, except when he was sick. He kept the sick book.

Re-examined. Never saw him worse for liquor than once and then he was not noticed by the commanding officer. I have never seen him when he was not able from that cause to do his duty.

Dr. Edward H. Worrell. Am father of defendant. Am a teacher, and in connection with my wife have been conducting a female and male academy. Have been a physician. Mental disorder is a very comprehensive definition, embracing want of judgment. He showed it very early in life to such extent as to create in my mind alarm and induce on my part consultation with his mother. He has been subject to delirium from beginning of his life. In 1845, near Baltimore, about 11 years ago, he was then about 16 or 17 years old. In the evening he came up to where we were staying; complained of being weary and tired; was asked to tea, but declined; said he would rest in the porch and refresh himself. Afterwards one of his aunts went out after him; came back and told his mother that Edward was standing by a tree, leaning his head against a tree and using gestures and actions that indicated extreme aberration of mind and suggesting to her dreadful apprehensions he was crazy. He was rearing and tearing in convulsions and we could not hold him. He was tearing his hair; he wanted to draw a knife on Mr. Rose. We could not manage him. Mr. Rose was apprehensive that Edward wanted to get a knife out. Edward made indications of getting a knife out, but for what purpose no one knew. He seemed like a perfectly wild man. He stared out of his eyes. It took all of us to keep him down. After a considerable struggle (he was very athletic at that time) we succeeded in getting him down. The paroxysm was still on him, and he continued to throw himself about violently. He was muttering and mumbling and talking. Had to watch him all night but he was not violent after that. He finally went off in a kind of stupor; he was quiet through the night. He showed no mark of intoxication. Never have seen him so at all. The next manifestation of his variation from a

normal condition was at Portsmouth, Ohio, at Eldon & Barr's store in the beginning of 1850. Don't know he had any fits at Cumberland. While there he dashed out with only one or three dollars in his pocket to walk to California, to never stop till he got there. He broke away from us; and we knew nothing till a friend told us next day. When he got to Pittsburg, he wrote for money; received it; came back to Cumberland; then went to Portsmouth. One evening he was brought to my boarding house at Mrs. Davis' in a state very similar to that he was in near Baltimore. His fellow clerk brought him there—Watson. From Portsmouth I moved to Kentucky. This was about the beginning of the next year. I saw Edward's condition as related by Dr. Curran, at whose house we were living. Recollect the consultation I then had with Dr. Curran. We thought him a perfect maniac. There was no cause for the fit that I know of. We believed it a perfect case of epilepsy. Edward would sometimes go out and sleep with some young men. On one occasion some of them came to me and told me Edward was in a very bad way. He had a return of these spasms. He complained of a dreadful headache. That was always a symptom with him. In the fall of 1852, he enlisted in the army. About the same time I went to Dover; to my great annoyance he went to Baltimore and enlisted in the army. I did not see him afterwards until 1855, at Wilkesbarre, Pa. The mosquitoes had driven me out of Dover. In the first part of 1855 I obtained his discharge from the army, through Gen. Pierce of Maryland from Jefferson Davis. When I came to Wilkesbarre my son came to us there. He there practiced dentistry, in the office of Dr. Eachurt. The ague shook my wife out and we had to leave there. We went to Louisville, I to find a school, my son to find a place to practice dentistry. Then I went to Dover. I then did not afterwards see him until in Dovér. He had gone to Cincinnati and rejoined the army. Saw him in Dover about a week before his arrest. During his then visit we had no suspicion of anything wrong. He used to attend musical soirees given by amateurs; used to call and bid us good night and to walk and join me in the street. He wore different clothing. One time I recollect he wore blue trousers. After my son's arrest, I got to St. Louis, my wife and self, in about eight or ten days; against the opinion of physicians my wife accompanied me. Have not since seen this irritability in him, until September. Have discovered no violent fits in him since his return from Union, from the last term of this court. After that time he had had chills. He had no fits during the confinement previous to September. He seemed to need fresh air. I applied to Dr. Bassett to get Felps, the governor of the jail, to get him to give Edward fresh air and more enlargement. The doctor did not do so. I treated him; the fits then came on, became very bad and alarming; called in Dr. Davis. I did so because Dr. Bassett did not call at my request. The indications were at first great irritability. These fits were never vio-

lent, and more frequent in the forenoon. Sometimes they would begin by drowsiness. Restless if things did not go right. He would then have a peculiar look in the eye. Then he would faint away. His pulse would flutter and then intermit. I sometimes thought he was going to die. All of a sudden he would have a most violent spasm, and thought he would break every bone in his body. His eyes afterwards would become fixed and glazed like the eyes of a dying man; then he would gradually revive, mutter, mumble, froth at mouth, show the voluntary muscles were out of the reach of the will, and gradually come to himself. The manifestations were not always the same. Sometimes he would walk about with his eyes staring, sometimes and generally he would lie down when dizziness and sickness began to come upon him. Have seen him misconceive what did not exist. He thought he saw flying gnats, which did not prevail; there was nothing of that. Dr. Davis, besides myself, treated him for epilepsy. He occupied the cell in northeast corner of the jail in the third story—I think No. 25. Either my wife or myself have been with him every day since. We often went together, but alternation was the rule we established; she in the morning and self in the afternoon. We changed as near dinner as would accommodate the officers of the jail. We had a stove in his room warmed by alcohol fuel, by which he would cook his food.

Cross-examined. R. W. Raisin married a cousin of Mrs. Worrell, the mother of prisoner. Samuel Ringold is brother to Mrs. Worrell; he is 50 odd years old; I suppose about 56 years old. Know nothing of Dunn. Blocher is no relative whatever. There are no other persons whose depositions have been read, related or connected. Guess Raisin is 50 years old. From when Edward left Louisville until I saw him at Dover; don't recollect he said he had left the army. The newspapers stated and Lieut. Clark wrote me he was dead in the manner expressed here today. My impression on his arrival was he had deserted. Either asked him or took it for granted; don't recollect it. It was heard sometime in Dover that Gordon was killed before the news was communicated to me after his arrest by Dr. Bates. His previous letters had shown great dissatisfaction with the army. He had none of these fits at Dover. He was about the same as usual. I am astonished now, he then maintained his normal condition of mind and equanimity, he knowing what we did not.

Mrs. Elizabeth S. D. Worrell. My son is 28 years old; was born in Wilmington, Del. When he was only 4 or 5 years old he exhibited irritability and want of self-control. Think he had less self-control than children of that age generally have. He was not injured in the region of the head that I know of at that time. This want of self-control continued to increase. The first violent fit he had was in July, 1845, as related by my husband. The next attack was when he was brought home by Mr. Watson, as my husband related. In Baltimore the talking was not in his sleep; it was before and after

he woke up. As far as I saw his condition was the same after the paroxysm at Portsmouth as at Baltimore. Saw him again in the same condition at Claysville, Ky. The day of that fit he was more excitable than I had ever known him. The fit was at night. There was no object more than usual to excite him. Generally a word from me, or my hand on his shoulder will control him. That day I went to him several times and asked him what was the matter. I saw his eyes looked wild; he was restless; he walked quick. I had been in the habit of watching him for a long time. He said, I don't know, mother, what is the matter, but I feel very bad. He got more and more restless towards night. Quite early in the evening, earlier than usual, he said he believed he would go to bed. He slept in the house, perhaps in room with Dr. Curran and some other gentlemen. Did not hear any more from him until about 8 or 9 o'clock. We had not gone to bed. They sent over for his father, saying he was very sick. His father went over immediately. I was not prepared to go just then. In a few moments they ran over, telling me he was dying. Went over and found him in violent convulsions and several trying to hold him. Was more frightened than even at the first fit; it appeared worse. Don't know how long it lasted. He tore off his father's coat sleeve. He foamed very much at the mouth. It passed off that night. He did not recover from it so soon. He was in bed all next day. It appeared to affect his mind more than the others. For several weeks in talking with me he would shed tears and be very desponding. He often said he wished he could die, and when I asked him why, he answered, because he felt so wretched; there is no reason for it, but I am tired of life. The next fit I knew him to have was at Winchester, Ky. Did not see it; I only know him to have in what my husband told me. The next attack he had at Baltimore. I was not there; his father was. Did not see him again until he got out of the army and returned to us at Wilkesbarre, Pa. He seemed to control himself better when he first came there, but towards the last not so well. On one occasion I was trying to reason with him on some subjects, and he used language to me he had never done, and said he would not be controlled. At this time his eyes were wild; he talked loud, was nervous, so that he could not hold himself still. I visited him at the jail every morning at 9 and left there generally at 12 or 1. His father spent the evening with him. The last of September, after his return from Union, I witnessed the first return of these paroxysms. Their first symptom would be great irritability for an hour or so; he would fall back as fainting, and remain insensible sometime for an hour's time. He would have violent convulsions, throw his hands against the wall violently, would look at the wall as though he saw something on it, grit his teeth, tear his hair, and very frequently would not become calm until after I could get his teeth open and give him a dose prescribed by Dr. Davies. After the paroxysm he would sometimes not sleep, but appear

stupid. Would put my hands over his eyelids, and it seemed to compose him. He would continually talk, call over the roll of soldiers, and almost invariably call constantly on Lieut. Clark and ask if his horse was ready for him to go to Leavenworth City. Sometimes he was apparently cheerful. The alternations from cheerfulness to depression were not founded on any causes I could account for; were generally sudden. From the latter part of September, 1856, until we came up here, I have not witnessed less than 100 paroxysms. He would have sometimes two a day, not all equally violent; sometimes mere insensibility. Day before yesterday he was going to have an attack; he did not. On one occasion the paroxysms were so violent I had to open the small trap in the door and called in the under-turnkey, named Mike, to come and help me hold him.

Cross-examined. None of these crazy symptoms returned on him until after last September term. He was irritable from childhood. I could always control him by a word except in these paroxysms. My corrections of him when young would sometimes increase the excitement, would enrage him more; he did not seem to be able to bear it at all. My friends said I was too strict and I would then relax my discipline. He had but few playmates; had very warm friends amongst them, yet when they were very fond of him he was irritable towards them.

IN REBUTTAL.

Dr. W. W. Bassett. Am a practitioner of medicine; have lived in St. Louis three or four years. Before that lived 16 or 17 years at Manchester, St. Louis County. Have practiced 21 years. Hold the office of county physician. Have attended Worrell in jail; saw nothing like derangement of the mind at that time; no symptoms of insanity that I know of. Asked him the usual questions physicians ask patients and he answered them as satisfactorily as patients usually do.

Cross-examined. He complained much of headache. Don't know but what it was the common manifestation accompanying chill and fever. Don't think anything was said to me about his having had epileptic fits or convulsions. Nothing that I heard of or saw induced me to look for anything else than the state of the brain incident to intermittent fever. In 99 cases out of a hundred a pain in the head, or headchae will accompany a chill or fever. Think, as a physician, I saw him from six to ten times. The causes of insanity are represented to be various. Epileptic fits may be one means of producing insanity. Never witnessed it complicated with or caused by epilepsy, though it might. This kind or character of insanity produced by epilepsy, so far as I have heard of it and from the books, is imbecility, by which I mean the mental faculties are very much impaired. Have repeatedly treated cases of of epilepsy in my practice; they were cases of both long and short standing.

The mental symptoms were not changed materially after the paroxysm was over, in the cases which I have seen. Epilepsy is caused sometimes by mechanical violence, as a stroke or blow on the head, sometimes by grief, joy, fear, fright, or so on. All the passions, or most of them, may produce it. Some say that the brain of the subject will on dissection show traces of the disease, while many deny it. The disease is characterized by a disturbance of the mental faculties, which some say affects chiefly the brain, but others of high authority say the seat of the disease is the stomach and intestines. French writers say so. Epileptic patients generally complain of pain in the head. Never attended patients in a lunatic asylum. The work I refer to is Pinel. Don't recollect to have seen Esquirrol given as authority, nor Mark. Have seen Pritchard quoted but not Gaylor nor Beck. Have seen Ray. Have read Pinel, Pritchard and Ray, but have not studied them carefully. It is not within the usual range of my practice; in this I do not pretend to be posted up. I know that it is a very difficult thing to determine frequently if a man is sane or insane. I will give the reasons why I think so. In the first place, I know of no physical reasons peculiar to insanity. Some men are perfectly sane on all subjects but one, and unless you touch on that subject you can't tell whether they are insane or not. This is called monomania. The difficulty of determining insanity would be increased by feigning it. It is represented that insane persons conceal their insanity, and that increases the difficulty. Insane persons are reported as having so carefully concealed their insanity as to escape from lunatic asylums. By insanity I mean alienation of the mind or mental aberration. When there is a departure in an individual's course from what he has usually been, then there has been a mental departure from his usual standard, and without cause for any sudden change, it would show insanity. An entire sudden and complete change in the line of a man's conduct from his former self without any apparent cause, is in my view of it an alienation of mind.

Re-examined. When a depraved motive or a course of conduct or line of conduct intended to carry such out is exhibited, I would not consider that to be insanity. If a murder be committed, the body concealed by the murderer, the property of the murdered man appropriated to the use of the murderer, the murderer flies, changes his name, travels 1,000 miles before he is caught, is found with the murdered man's property in his possession, I would in such case see no evidence of insanity. I have attended a great many insane patients. I have never seen epilepsy produce insanity, though some authors have said it would. The authors say it produces imbecility. It is not dangerous insanity. Imbecility is an approximation to idiocy. Would not be afraid of an imbecile except from the excitement of the moment. Sometimes by plaguing them they might momentarily be aroused to do harm. An idiot can at once be recognized. An imbecile is not so

easy. If I understand the duties of first sergeant, he could not be an imbecile, as I have defined it, without its having been found out.

Mr. Wright. Suppose it was uncertain whether the man who appropriated the property had anything to do with the deed, that he fled and acted as no sane man would act, would render himself conspicuous everywhere, proclaimed his name, wore the apparel which would identify him, when he had the means of changing, would not flee when pursued, volunteers to tell the property to be that of the man killed, and in all respects acts differently from the sane man who has murdered and who seeks to avoid punishment, would you see in that no cause to suspect insanity?

Dr. Bassett. In your question you speak of acting as no sane man would act. In such case I should think there was insanity. I said in the beginning of my testimony that what in some men was called sanity was in others insanity. That a man's previous conduct must be known and any sudden or perfect departure from that without adequate cause, motive, object, or intention, would indicate insanity. In continuation of the answer I made, if he was insane, ten days before; I mean in connection with my other answer, I don't say that the hypothesis presented does not furnish evidence of insanity. I want you to take my whole answer together. I could not; there was no insane action in the case.

Dr. G. Y. Bannister. Am a physician in St. Louis; am physician to the city hospital; it is not a lunatic asylum, though we have a few lunatics there. All diseases are treated there. Have had an opportunity to see lunatics to a limited extent. Have been in the hospital at Philadelphia for one year, where we had about 100 male patients at one time and about 80 women. Have not seen wild delirium or what you would call crazy, resulting from epilepsy, but have seen imbecility or idiocy complete from it. Some medical books describe epilepsy as resulting in insanity, but I think they do not state the kind. Long continuance of epileptic fits through many years impairs the mind. In the cases I have seen, there is a gradual loss of memory, and the reason becomes impaired. The mind assumes imbecility. Congenital malformation shows it. The last degree of want of mind produced is idiocy. An idiot is shown by want of expression, dullness in the eye, and retreating forehead. No man can be daily with another who is an idiot and not know it. If he was an imbecile he would detect it. A man afflicted with imbecility or diocy in my opinion could not hold any office of daily responsibility without its being found out. Have seen imbecility and idiocy produced by epilepsy. As to frequency and time I have not seen a case where epilepsy produced such result. Have seen imbecility, but never idiocy except in case of congenital malformation. In the case I refer to, the attacks were every other day. In occasional attacks have known persons who have had epileptic fits from early childhood to the age of 25 years, once a month. They were in possession of sound mind.

Cross-examined. Have never seen epilepsy combined with the form of insanity known as irresistible impulse. There is a form of insanity known as homicidal mania, when a person knowing right from wrong has no power over the will. Never knew an epileptic to commit suicide. Epilepsy would not be more apt if begun in early youth in after-life to produce a disturbance of intellect unless the attacks were very frequent. It has, however, been known to kill in a few attacks. According to authors in homicidal mania, the subject, besides the want of power over the will, tries to kill or do violence to those dearest to him, his parents, children, etc. It shows an entire perversion of feeling. Insanity is often very difficult to determine. It is detected by the conduct of the individual; some kinds are easily detected. Raving mania can be unless feigned. Imbecility is easily detected by the appearance or by conversation. Raving mania or imbecility is most generally feigned. Never personally knew a case of feigned insanity. Never saw after a case reported of feigned monomania. While in the almshouse in Philadelphia knew of cases frequently where the patients concealed their insanity to get out. They did not deceive the keeper. I have seen great ingenuity on their part to make the keeper think them sane. The capacity to reason is not compatible with mania, unless in lucid intervals. It is not incompatible with monomania. In homicidal mania a person seems to be laboring under great distress, oppressive thought openly commits the act, sometimes desires punishment, and does not attempt to conceal the crime. He seems to labor under some oppressive burden of thought, and to seem relieved after commission of the act. In committing the act in such case, the books lay it down, the person thinks he is doing his duty in committing the act. In homicidal mania I don't know of a case where a person flies to avoid the result of the act. They generally attempt the act at the first occasion which presents itself.

Beverly H. Robertson. Am an officer of the army, in Richmond, Va.; am first lieutenant. First saw prisoner at Fort Leavenworth, Kansas. Was stationed there with him until July, 1854; then crossed the plains as far as Fort Union, in New Mexico, with him. Never saw him since then (last of August, 1854) until I have seen him here. Never saw any symptoms of his being deranged. He was like ordinary men as far as I could see; saw no insanity nor symptoms of derangement of any kind. Know of his having no epileptic fits during that time. Did not hear of his having any. The duties of a first or orderly sergeant in a company are to keep its books, call the rolls, etc. It is the most important office in the company. An insane man or idiot could not discharge the duties of that office.

Cross-examined. A man supposed to be insane, I think, could not have been permitted to hold that post. I know he would not. Was officer of the day, while he was corporal of the guard. The position must indicate his character. If he was suspected of having epileptic fits, he would

not be continued in such an office. If the recruiting officer did his duty, a person so afflicted could not be enlisted.

Charles T. Clark. Reside at Fort Leavenworth; am quartermaster sergeant in U. S. Army. Know prisoner; knew him at Fort Leavenworth. He deserted on the evening of January 7; a sergeant of the name of Bruff, Company I, also deserted same time. Two horses were taken at same time. I know the horse Worrell was in the habit of riding was left behind. The one taken was far better; he was a noted horse for his appearance; it was certainly more valuable than his. The one he was then in the habit of using was in a poor condition. Soon after Worrell joined in August, 1855, he was made first sergeant. Saw him every day, when on duty; sometimes oftener. He was on duty unless sick or on leave. Saw him once, between November, 1855, and January, 1856, in liquor. He was riding on horseback and could not sit in the saddle. He used to keep liquor in his room. Have been there many times and found liquor there. There is no army regulation against it except against drunkenness. They all use liquor generally. It is according to the orders a sentry receives, if any person may pass or not. If ordered not to allow a person to pass, it is common for sentries to allow members of their own company to do so as long as they are satisfied there is no bad intention. Worrell bore a fair character in the camp. His character was that he was the best sergeant we had in the regiment. That continued until the day he left. No insane man or idiot could hold such office; it is impossible. The duties are very complicated.

Cross-examined. Have no reason to doubt he was honest. Was never called to run to his room. Never saw him present a pistol loaded at a person to shoot him. A sentinel's duty is to shoot a person trying to force his way. If I know the sentinel he would not shoot me in time of peace. Since I have been in the regiment I have passed sentinels every night, often and often, from June, 1855, until now, without being stopped except two or three times when drunk. When I saw Worrell reeling in his saddle he did not fall. I don't know if it was from liquor or disease. Think he acted under liquor. Had not seen him drink. He was riding in company with another man who was staggering drunk. He was not an habitual drunkard. We have had men there who never drank. Worrell drank with me when at his room. The liquor was whisky. I never drank any brandy there that I know of.

James A. Ferguson. Have been examined before and said I bought a mare from the prisoner Jan. 24, 1856. The conversation between us was as follows: I asked him where he was from and where he was going. He said he had been to Kansas, but was going to Clark County, Ky., where he lived. He said his name was May. Bruff and Mr. Gordon were with him. The horse trade was in the usual form. The horse was taken away from me. The man described the nag so well, I gave it up without requiring him to prove it. The man took the horse; I gave

it up to him. Have seen Worrell since at St. Louis and have had conversation with him. Worrell recognized me and recollected the horse trade. Asked him if he did not think he ought to pay me my money back again. He said he did not have my money but he would make it right with me. Told him by describing the horse the man had proved to my satisfaction he owned the horse. He said I should lose nothing by it; he would make arrangements for me to get my money back again. He asked me first if it looked reasonable for him to pay me all my money back, when I was going to appear and do all I could against him. At the time I purchased the pony from him I took him to be sane. I saw nothing insane about him when I saw him in the jail. Took him to be a very shrewd man.

Cross-examined. He made this trade without getting off his horse. The whole time of making the trade did not take over 15 minutes. Had no suspicion he was insane, and therefore did not examine him with that view. If I had suspected insanity I would not have known how to go to work, how to have found it out. He did not speak loud at any time except when he halloed back to know what I would give him for his pony. Saw no excitement in him.

Wilson Hutchinson. Have been examined before, and told of Worrell, Bruff and Gordon being at night at my house on January 24, 1856. They came to my house about dark. They stayed at my house all night, took supper and went away between 7 and 8 next morning. From what I saw of them did not take any of them to be insane. If Worrell was insane it was more than I knowed. Did not dream of such a thing. Did not see anything to indicate it. I have seen him in jail; he recognized me. Saw nothing then to indicate he was an insane man.

Cross-examined. If I don't make a mistake, we, all of us, I think, went out to the stables for the horses. We had the horses caught and saddled. At the time he was fixing the pistol before he put it on the mantelpiece; he and Gordon had some words; don't know what they was, but they were talking. Did not hear Worrell say anything to my daughter. In jail he asked me how me and my family were.

Martin McMahan. Have been examined once. Saw them on 25th and 26th January, 1856, at Christian Way's tavern at St. Charles. Was in Worrell's company in the barroom there. I saw no more of Worrell's being out of mind than myself or any one in the house; I had no idea of his being crazy.

Hartwell Richards. Have been examined. Worrell came to my house Saturday, January 26, 1856, and stayed until between 9 and 11 next morning. Worrell went by name of John Ross, Bruff by name of Charles Strong. Saw him frequently that evening and saw no indications of insanity about Worrell at all. Had no suspicion of it.

Cross-examined. Saw Worrell almost always in company with others about the house. Had few regular boarders. Think he was there pretty much during the day on Saturday. Three gentlemen started to the theater. Did not see Worrell after he

came back that night. Had no long or continuous conversation with Worrell while he was there. Don't profess to be a good judge of insanity. Know it when I see it plain. I saw no effort on his part to conceal himself. It was very cold. The persons in the house remained pretty much about the fire. Worrell did not stay in his room any time except while sleeping. There was no fire in his room.

S. H. Gould. In January, 1856, kept tavern with my father at Vincennes. Worrell stopped at the American Hotel kept by us (then called the Gould Hotel) from February 2 to 6. He was in conversation with many gentlemen there talking about Kansas, slavery, etc., particularly with a Mr. Butler, who, I think, is connected with the railroads. Saw no insanity about Worrell. They had so long a conversation that I pointed to him and said to a man in my employ that I thought Worrell was a very intelligent man and capable of giving a great deal of information. He had two horses, which he sold. The day before he left he sold one to my father. Think my father or self were the first persons he proposed to sell the horses to. While at Vincennes Worrell appeared to go about. I took a walk with him. We took a drink together. He seemed disposed to make himself familiar with every person. We went to the most public coffee-houses in the place. We have no theater there. We are too moral. We have balls. Don't know that I am a competent judge, but I saw in him nothing to make me think him insane. Saw nothing about him different from ordinary persons except his disposition to make himself familiar. Have seen many others, however, do the same. Did not think them insane. I have seen crazy men. Worrell showed no such system. Have kept tavern and been accustomed to observe men since I was 11 years old.

Cross-examined. There is no depot in Vincennes, but the trains from St. Louis stopped there to let passengers eat. Prisoner did not look like a man who had committed murder and was flying from it. Never saw him intoxicated. He asked where the depots were and would walk out to them. When he went to the ball, he unbuckled his vest and handed me the pistol to keep for him. Next morning he got it.

January 29.

Edward Lane (recalled). The duty of a sentinel is to obey all orders he shall receive from an officer of the guard. If a sentry receives orders not to let a man pass he, as a last resort, must shoot him, but he must try all other means first. Was in Fort Leavenworth in 1855; I stood as sentinel there. Have there known even officers approach my post and pass without the countersign. The sentinel is supposed to know no one while on post. I would not like to risk myself in passing a sentinel who had orders not to let any one pass. I have often been detained myself by sentries. Was a private.

Cross-examined. Sentries have shot at men. Have never shot at a man, in such circumstances, that I was acquainted with.

MR. GALE, FOR THE STATE.

Mr. Gale. Gentlemen of the jury: It becomes necessary for me, as the circuit attorney of this district, to say something to you in this important case. After the length of time you have been compelled to listen to the protracted details herein given, the calmness of your countenances shows me you are prepared to do justice to the State upon one side, and the prisoner at the bar upon the other. I conjure you, gentlemen, to throw away all outside influences. Approach this as a new case. In this age (newspapers in every house) you must have heard of it before. On your *voir dire,* you stated, you had heard of it. In all its phrases it is one of the most extraordinary cases in Missouri, or even in America. The parties concerned, the person murdered, the testimony detailed, are all extraordinary. In the course of the defense Judge Coalter seems to be put upon trial. This was as extraordinary an opening on the part of the defense as the tragedy itself was. We all know that Major Wright's reputation for talent and eloquence is co-extensive with the Union itself. Is it strange that Judge Coalter was employed at my request? What was there in his remarks to require the observations made by defendant's counsel? The only one I saw was that Judge Coalter told you it was your province that you should judge of circumstances constituting insanity. The Supreme Court of Missouri has decided that anyone can judge of it, and you must. The doctrines of insanity are now carried out to a great degree of refinement. There has been an effort to establish a mental stethoscope to gauge the brains, and measure the faculties. You have experience. Can you not judge of insanity? Is it not ridiculous to think of a person gauging a person's brain with so scientific an instrument as a mental stethoscope must be? Gauging is more like a carpenter measuring his work. Defendant's counsel says the defense of insanity is very uncommon; and that he has only known it in his personal practice in three cases, notwithstanding he has been in full practice for thirty

years. We all read lately of Huntington in New York, a wealthy nabob, who had for years been practicing forgery. He set up insanity as his defense. Who is to judge of this but the jury? Judge Coalter only stated to you what is true, that you are the judges, whether the defendant is insane or not. The defendant is charged with the murder of Basil H. Gordon. To this is presented a double defense:

1. The killing of Gordon by defendant is denied.
2. He is an irresponsible being and therefore incapable of crime.

I must recapitulate the testimony. Though I know you have paid attention, my duty is to recall it briefly to your minds. If Worrell and Bruff were present, aiding and abetting in the murder, both of them were principals under our statute. Whether the one or the other did the act, only creates in the law a distinction without a difference. It is immaterial which shot the pistol. Although the indictment charges two counts, if either be true, you must find the prisoner guilty—unless you find that at that time he was insane. The indictment charges the murder, and that Worrell committed the act wilfully, deliberately, premeditatedly and with malice aforethought. The argument of defendant's counsel, I think, to be an effort only to grade the degree of crime, and if possible to reduce the same to murder in the second degree. This murder is charged as having been committed wilfully, deliberately, premeditatedly, and of malice aforethought. The legal explanations of these terms have been explained by the counsel who opened the case. In defining the meaning of the word "wilful," etc., if the act was done in order to perpetrate a felony; it is, in such case, unnecessary to prove express malice. Then I say, from the evidence, there was a robbery committed in this case. Strong circumstances tend to show this. Then, premeditation will be presumed in this case by the act of the robbery. Malice is of two kinds, express and implied. Maj. Wright seems to think some fact to show express malice must be proved. I assume it as proved here by the killing.

We admit it is necessary to prove wilfulness, deliberateness

and premeditation to make it murder in the first degree. This forms the legal definition of malice: the concurrence of these states of mind and intention. On hearing this, I suppose your minds are prepared to investigate an analysis of this case. If you find there was express malice, you must find the prisoner guilty of murder in the first degree. If express malice be not proved clearly to your minds, you must find in the second degree. Defendant's counsel read to you from Wharton to show that intoxication would reduce the grade of murder to the second degree. It cannot do so. When a murder is committed for an object, it does not evidence a very insane man. Intoxication then is no defense when it is shown that an object is manifest in the commission of the fatal deed. A sane man will kill with an object. It may be from prejudice, or for purposes of robbery or other criminal purpose. An insane person has no object. If whoever killed Gordon had an object in view, it only tends to show his sanity. Maj. Wright I admit to be most learned in medical jurisprudence. But doctors disagree. The two medical witnesses in this case are referred to. But the authors of all books on this yet unsettled and misunderstood subject are all theorists. Dr. Bassett in his profession seems never to have observed any particular effect of epilepsy on the mental faculties. Other physicians the reverse. Medical men never have agreed. This is peculiar to their profession. They do not possess any fixed unity of views. With them, their systems are all theories. Therefore, I caution you against such learning and such opinions, delivered here orally or from books. Defendant's counsel will bring in authors most favorable to his present purpose. There is something peculiar and astonishing in the conduct of this defense. We looked to hear testimony tending to show hereditary insanity—when none such was proved, the defense suddenly shifted to epilepsy. It is not for me here to discriminate as to the authors which will be quoted for the defense. I cannot anticipate them, and leave that therefore for the counsel who will conclude this on the part of the State. I then come to two results: First, a murder was committed; second, it was committed by Wor-

rell. The defense has taken a wide range, to which we have interposed no objection, beginning as far back as 1831. We have on the part of the State come up step by step, day to day, month to month, to the fatal January, 1856. Defendant's counsel tried to excite your sensibility on account of the remarks of Mr. Coalter upon the amiable character of Mr. Gordon. Would not the defense have promptly shown it, if Gordon had been a rash, impulsive and violent man? Would it not have been a strong point in the defense? We do not wish to create any excitement. We contend this is a case of murder in the first degree as charged in the indictment, and that it was committed by the prisoner, wilfully, deliberately, premeditatedly and of malice aforethought. Now, gentlemen of the jury, if you can find from the testimony that there is a want of the requisites of guilt in the first grade of murder, give the prisoner the full benefit of the same. But if the plea of insanity be relied upon, you must find whether he was laboring under it at the time he killed Gordon. All other temporary symptoms, else, are of no avail. Can you, from the testimony find that, when he killed Gordon, he was incapable of knowing right from wrong? If you do, acquit him. If not, was the killing wilful, premeditated, deliberate and of malice aforethought? To constitute deliberation, one minute of time is sufficient. I again state the definition of malice to enforce it clearly on your mind. Was the wound accidental? Was Gordon robbed by any others than the two men in his company? If you have a reasonable doubt of this you must acquit him; but that doubt must be as to the whole case. I know you feel your responsibility; and that you must give your verdict contrary to all sympathy and mere feeling. It is equally disagreeable, gentlemen, for me to prosecute in this case, as it is for you to decide on it. I doubt not you have made up your minds. You saw the manner and the intelligence of the witnesses, as they gave their testimony. You are then called on to find him guilty, if there be no reasonable doubt on your minds. If you believe before he killed Gordon he intended to rob him, you must say the State has proved all that constitutes express malice. I shall not detain

you longer. I cannot anticipate Major Wright's defense. He will be elaborate and entertaining; he will read many cases. If he satisfies you the prisoner was insane at the time of the killing, acquit him. Otherwise you must find him guilty of murder in the first degree.

MR. WRIGHT, FOR THE DEFENSE.

Mr. Wright. Gentlemen of the jury: Jurors, you must pardon me if I notice for a moment the extravagant eulogies lavished on me by the gentlemen of the prosecution. This sorcery which they impute to me, this power to cheat men of their reason, this capacity to lead astray the common mind, is a thing gotten up fictitiously, and under a very transparent policy. It is designed to hurt the defense, to impair and weaken whatever impression may be made on your minds by fair and manly argument, favorable to the prisoner and his cause. In a word, by magnifying my capacity, they hope to paralyze your own. I do not claim to be insensible to praise, but I would have the gentlemen know that my vanity has not blinded me to the emptiness and shallowness of their diplomatic phraseology. In the spirit of diplomacy, I return to these gentlemen "the assurances of my high and distinguished consideration."

The prisoner, gentlemen, is entitled to a fair trial; the only object of the law is justice; its only desire is the ascertainment of truth; and these ends it would reach by the fair, calm and dispassionate exercise of the best faculties of reason and judgment possessed by its sworn administrators. If the prosecution would push you to your conclusions by another and shorter way, the prosecution wrongs the law! Gentlemen, I rely upon you to vindicate it!

Something, at least, has been gained by the discussion. The prosecution began with a law of murder that had no malice in it. My friend, Mr. Coalter could not descend from his generalities to a thing so elementary as malice aforethought. It seems to be now conceded that there is such a thing, and that it is of three kinds, and that one kind will make capital

murder; but you are still left in the dark. The prosecution is moved to the law only by the point of the bayonet, and it will not budge an inch further than the practical puncture of the instrument forces it. "Implied malice," says Mr. Gale, "only makes murder in the second degree; the State must prove something more than that the killing was unlawful, to make the crime murder in the first degree."

"Something more" must be proved! What is it? What is that "something more," Mr. Gale? In all his speech he refused to tell you! Up to this period you have not heard from the prosecution what that "something more" is; and yet you must find it before you can find murder in the first degree. Why are you left to guess at that "something more"? Your consciences are involved that your guess shall be right; why are you permitted by the prosecution to guess at all? What is it that fetters the gentlemen at the other side? Why are they so costive as to the necessary elements of capital murder in this state? Do they hunger for the blood of Worrell? Are they fearful that a candid admission of the requisites of the law will show you that it cannot lawfully be shed? If the prosecution will not tell you of these requisites, I have told you; and while they shrink from a manly admission of the truth, they are not bold enough to traverse my exposition. They do not deny, they do not admit, and compromise with silence by saying "something more" must be proved than the unlawfulness of the killing, to make murder in the first degree.

Can you conceive of a greater calamity than ignorance (in those who have to administer criminal justice), of the boundary line between murders, on one side of which line stands the gallows, on the other the penitentiary? Yet what has the prosecution done to show you that line? They have sealed their lips, or spoken only ambiguous words calculated rather to mislead than to enlighten you, and have thrown upon me the task of running the line. Gentlemen, I shall ask the Court to sanction my survey. That "something more" than the unlawfulness of the killing is malice express, malice proved as a fact by evidence coming from the lips of witnesses,

and not a fact guessed at by you, or inferred, implied or presumed by the law in the absence of knowledge. Can it be found in the evidence you have heard? The evidence is purely circumstantial. The State has not been able to introduce any positive testimony; not the least. There is nothing to guide you but circumstances, and therefore I have something to say of the nature and quality of that kind of evidence, and what it must be to warrant conviction. That such evidence has been treacherous all experience shows; that it must ever be treacherous philosophy makes manifest. What is circumstantial evidence but reasoning? It is dependent upon faith; faith in the ability and honesty of the witnesses for the circumstances; but what shall be done with the circumstances obtained by faith, is a question solved only by the reason of man. Every step afterwards is a process of induction, and by a series of inductions a conclusion is reached. If a single error is made in the process, the conclusion is necessarily wrong. One blunder does as much mischief as a hundred. If you conclude that one fact is necessarily dependent on another fact, and it should happen to be independent, the mistake is fatal. The logic you invoke in such case must lead you to a false result. The eulogists of this species of evidence find security in the number of the facts, "in the many links in the chain of evidence," but these likewise multiply the chances of mistake in the process of induction. The inherent vice of this kind of evidence is incurable, for being only a process of reasoning, human reasoning, it must be treacherous, until man becomes infallible. There is another prominent defect, incurable also, and that is the uncertainty of the facts or circumstances themselves. What you call a fact or circumstance may not be either, but only an inference or deduction made by a witness from some other fact, within his knowledge, and which inference he has unconsciously substituted for a fact. Any one at all acquainted with human testimony will concede that nothing is more frequent, or usual, than the substitution of an inference drawn by the witness upon something precedent for the fact itself. The liability to error is greater in proportion as the witness thinks the inference

to be reasonable. Thus this inference of the witness is made the starting point in the process of reasoning by the juror; and if wrong, in fact, secures error throughout the process of induction.

A Dutch ambassador told the King of Siam that in his country the water was so hard in cold weather that it would bear an elephant if he were there. The king replied, "Hitherto I have believed the strange things you have told me, because I looked upon you as a sober, fair man, but now I am sure you lie." The king's reply illustrated the nature of circumstantial evidence. He reached his conclusion by an induction founded upon the supposed dependency of one fact upon another fact. He thought that whenever an elephant came in contact with water he must sink or swim; and these being dependent facts, the conclusion was irresistible that the ambassador lied. We are unhappily more ignorant of the infinite combinations of facts and circumstances than the King of Siam was of the action of cold on water; and what is worse, we hug our false conclusions, reached in a similar way, with the pride and pertinacity of his majesty. Perhaps the most fatal quality of circumstantial evidence is its fascination. It panders to the pride of intellect, it persuades us that we are in possession of a power to penetrate the unknown, to bring light out of darkness, to reduce chaos to order. I have never seen a human being who did not feel the intoxication of circumstantial evidence; and therefore it is safe to say, its praises will be sung to the end of time. It is a thing of necessity, and will continue to inform, delight and deceive, but it does not exist without some restrictions and limitations. The law is not so in love with it as to let it do as it pleases. It may delight and fascinate, but it shall not kill, nor be made the instrument of death, unless it be of a particular quality. It has shed too much blood to be permitted to go quite at large!

I call your attention, jurors, to some few of the necessary requisites of circumstantial evidence under our law, before it is to condemn men upon it. Rule 3. "It is essential that the circumstances should be of conclusive nature and tendency." Rule. 4. "It is essential that the circumstances

should to a moral certainty exclude every hypothesis but the one proposed to be proved." (1 Starkie 5-11, 5-12.) Lastly, "Circumstantial evidence ought in no case to be relied on, where direct and positive testimony is within the power of the prosecution." (1 Starkie 5-13.)

Jurors, help me to try the circumstantial evidence in this cause by the tests of the law thus laid down. You perceive without any labor of thought that evidence which satisfactorily and certainly proves that one of three persons, A, B and C, did a murder, is inconclusive evidence, upon which A, B and C must all be acquitted. The chances are two to one that you will select the wrong man. It is equally plain that evidence is "inconclusive" which makes it certain that one of two men, A and B, committed the crime. In this case the chances are equal that you will select the wrong one. Now, the law most wisely forbids that any person shall be hung by chance. Probabilities are out of place here; they have no standing in court, on a trial for crime. Nothing but certainty will satisfy the law, or the conscience of a just juror. It chills the blood to think of the condemnation of a fellow-creature upon a guess, however shrewd. "In a case of life and death," said a supreme judge of Pennsylvania, "I dare not be ingenious." There must be certainty, nothing but certainty. We are not debating triangles, and of course I do not mean the certainty of the exact sciences, I do not mean mathematical certainty; but I mean moral certainty, the certainty which excludes possibilities and probabilities, the certainty which declares that if it be probably certain that a man is not guilty you must, for that very reason, acquit him. That is the law which you have sworn to administer; and that ought to be law on the most elevated principle of justice, for otherwise it is as demonstrable as any proposition in mathematics, that you must hang the innocent; you can't avoid the error, you must shed blood which you have no right to spill. If under our law the innocent shall suffer, it must be the result not of the system, but of human fallibility.

Who killed Gordon? I ask you under the circumstantial evidence the State has brought. Who killed Gordon? Do

you know? Can you answer me? If you answer (as the prosecution has asserted by indictment and by speech) one of the two, Bruff or Worrell, killed him, the answer shows that the evidence is inconclusive; upon such answer you cannot convict either. You perceive the evidence must go another step further to enable you to think of condemnation. What is that step? The evidence must satisfy you beyond all reasonable doubt that Gordon was killed by one of the two, and that the other knew before the killing that the deed was to be done, and was present at the act with the intention to aid and assist the perpetrator in the execution of that act. Observe: There must have been knowledge beforehand; that is, before the act, that it was to be perpetrated. 2d. Presence at the act. 3d. An agreement to aid in the perpetration of that act, if aid should be necessary. I meet the law of the indictment fairly; I do not lessen the breadth of a hair its legal import; and now I ask you, can you find these facts from the circumstantial evidence in the cause? Where is the evidence of the previous knowledge? Where is the evidence of the previous agreement? Look at the test of the sufficiency of circumstantial evidence furnished by the fourth rule: "It is essential that the circumstances should to a moral certainty exclude every hypothesis but the one sought to be proved."

The hypothesis sought to be proved, is that Gordon was killed by either Bruff or Worrell, and that the one who did not kill him knew beforehand that the other was to kill him, and agreed to be present to aid and assist in the killing, and was so present. That is the hypothesis sought to be proved; that is the hypothesis which must be proved, proved by the State, affirmatively and beyond all reasonable doubt.

May not all that is proved in this cause be true, and yet this hypothesis be not true? If so, there is an end of the cause. The question for you is not whether the hypothesis is probably true, nor whether it is more probably true than other hypotheses. It is not whether this hypothesis is the best explanation of the circumstances, the most reasonable solution of them, the most plausible account of the homicide;

but it is whether every other hypothesis is actually excluded, excluded to a moral certainty. That is the question! That is the question! And the enlightened conscience of every juror must answer it as he would answer it if the life of his own child hung upon the answer.

And how are you to answer it, gentlemen? The "how" brings to light the incurable defect, the inherent vice of circumstantial evidence. You are to reason out an unknown transaction; you are to find out by the eye of the mind what could not be seen by the actual eye. You are to look at a place you never saw (the scene of a tragedy), fix the *dramatis personæ,* and assign to each actor his part. You are to arrange the incidents in the actual order of occurrence, bring each actor on the stage at the right moment of time, and determine infallibly the words, gestures and action of each. You are especially to avoid a mistake of identity or change of cast. But your difficulty does not end here. You reason on what you have heard; but you must imagine also! You must task your intellect by running over the possible and almost infinite combination of circumstances in search of some other hypothesis which might explain all you know. You are to do what the Siamese king no doubt honestly tried to do, before he told the Dutch ambassador he was a liar; that is, hunt up some possible law of nature which would make water hard enough to bear an elephant. You are to invoke your creative power, your faculty of invention to see if every supposition is excluded, except that which the prosecution makes, to explain the circumstances detailed in evidence. If you should not happen to think of something which might account for all you have heard, if it should escape the counsel, the single counsel for the defense, the prosecution asks the life of the prisoner for our failure! And now you see also how fatal feeling and prejudice against him would be to the fair exercise of this power on your part. How such a state of mind would unfit you to hunt for another hypothesis than that which would condemn! Be assured, the prosecution will not aid you in this search. I may try, and fail; but neither their supineness nor my failure can discharge you from the

duty of searching diligently, anxiously, honestly. If you reason badly, it is fatal. If you do not imagine well, it is fatal; and yet, circumstantial evidence is lauded as the guide of safety in the most awful of human inquiries!

Jurors, pour out the mass of victims sent to the scaffold by circumstantial evidence. I have neither time nor strength and I may add patience to wade through the melancholy records. Let me present to you the case of a poor girl in England, slaughtered, judicially slaughtered, though innocent; slaughtered, because a jury could not or would not search for another hypothesis! I read from Starkie:

"A lamentable case occurred some years ago, which strongly illustrates the necessity of exerting the utmost vigilance in negativing satisfactorily every other possible hypothesis in a case of purely circumstantial evidence. A servant girl was charged with the murder of her mistress. The circumstantial evidence was very strong; no persons were in the house but the murdered mistress and the servant; the doors and windows were closed and secured as usual (inside). Upon this and some other circumstances the prisoner was convicted principally upon the presumption (i. e., hypothesis) from the state of the doors and windows, that no one could have had access to the house but herself, and she was accordingly executed."

I stop the narrative here. I do not yet wish you to hear what follows. I want you to sit as a jury on the case of the girl. I wish to show you what the fourth rule means. I desire to prove to you the fatal fascination of circumstantial evidence and its insidious treachery. These are the facts. What will you do with them? The house had but two tenants, one the dead mistress, the other the living girl. The doors and windows are closed, secured on the inside. Who could be the murderer but the girl? It is not a case of suicide. It is a case of assassination; and there is but one assassin! Beside other circumstances point to the girl and proclaim her guilt. Can such circumstances lie? Is not investigation ended? Why seek for any other hypothesis than her guilt? Can any supposition explain the circumstances, but the supposition of her guilt? Do you see any room for doubt? Can you imagine no state of facts which may save her life? Think,

gentlemen! Peep with the eyes of the mind through the infinitely possible combination of circumstances, and group together facts in such wise as to save her. She is innocent! She has shed no blood! She was asleep when the deed was done! Her mistress died by the hands of others! I say others—and the innocent slumberer did not learn of the tragedy until hours after her mistress was in heaven or hell! Oh! can you not see it! Reason out her innocence! Summon your imagination to the help of a poor girl! It is hard that the reasoning process, so loftily praised, so loudly eulogized in speech, so elaborately complimented in the fine rhetoric of judicial philosophy, should be unable to work out the innocence of one poor girl!

I think I hear her counsel say, "This evidence is not fit to take life; all may be true that you have proved, and still she may be innocent, and if this be possible the law declares she shall not die on such circumstantial testimony. There may have been a false key and entrance by it and exit after the murder. It was a two-story house, and there is no proof that the windows were fastened in the upper story. It might be that a ladder carried the assassin up to one of them through which he descended below, killed the sleeping mistress, and returning on his path gained the ground; when, removing the ladder, he removed all trace of his entrance and his crime. It may be in other modes, that do not present themselves to my mind, the deed was done by others—the thing is possible—the proof does not necessarily and certainly show her guilt; and that is the legal test of sufficiency." I hear the counsel for the Crown say, "These speculations are fancy work, the inventions of ingenious lawyers, contrived to screen guilt and baffle justice! A false key! What evidence is there of a false key? A ladder! Who proves there was ever one near the house since it was erected? Jurors act on facts, not on nice and cunning theories—they render verdicts on testimony, not on fine-spun subtleties of advocates; and this testimony establishes her guilt."

The cases supposed by the counsel for the girl ought to have saved her; they were enough to show that every hy-

pothesis but her guilt was not excluded. But it never occurred to him to suggest to the jury, that as the house in which the woman was murdered stood upon an alley, on the opposite side of which was another house, also of two stories, it was possible that the murderer entered the opposite building, hoisted a window facing the alley, extended a plank to the sill of the window of the upper story of that in which the mistress was sleeping, walked across on the plank, raised the sash, descended, did the deed, and returning the same way, hid all trace of the crime. He did not think of that! The jury did not think of that! The boasted reason and the quick imagination did not take in their wide range any combination of circumstances so wild and extravagant; and so the innocent girl perished on the gallows! And yet, all this wild extravagance was simple truth! Simple as the way to make an egg stand on end, just as simple as the truth which philosophy pronounced impossible till the egg did stand on end, and which philosophy then pronounced a truth so simple that none but the simple ever doubted it. "Hang up philosophy," which cannot see the truth; and "hang up" the "reasoning process" which hangs the innocent.

I continue from the authority the history of the girl:

"It afterwards appeared, by the confession of one of the real murderers, that they had gained admission to the house, which was situated in a narrow street, by means of a board thrust across the street, from an upper window of a house opposite to an upper window of the house of the deceased; and retreating the same way, leaving no trace behind them."

This is the rock on which circumstantial evidence ever spills. We cannot reason safely from the known to the unknown. Truth half told is always a lie. Circumstantial evidence never brings out all the facts, the whole truth, and we cannot by imagination supply what is left out. Worse than that, "truth lies in the bottom of the well," and the human mind dislikes the labor of going down to bring it up. If it can find anything resembling truth at the top, it will avoid the descent.

It is needless to go through the mournful catalogue of judicial murders done by circumstantial evidence. Its victims

all perish in the same way. The fate of the unhappy girl tells the whole story. If we cannot profit by it, the instructions of a wider experience would be useless. If the advocate in her case had supposed the actual truth of the transaction, would he have been heeded? Would not his suggestion have been dispatched by a sneer of the prosecution, or killed by three words: "This is far fetched"? Would the jury have given up the lie which seemed so plausible, for the truth which seemed so improbable? The law told them to give up; but they could not? The law told them so in the fourth rule, but they would not heed its mandate! Were they honest? Yes! in all probability honest and trying to do right; but fascinated, as all men are, by circumstantial evidence, they could not surrender the delusion which their own reasoning created. They could not feel and acknowledge their own fallibility, and because they could not, they murdered an innocent girl. The pride of intellect makes a conviction wrought by circumstantial evidence the strongest of all our convictions, and it is therefore the last which we are willing to surrender.

Do you not pity that jury? Did they sleep in peace after they knew the truth which they had rejected? How plainly they saw the truth "afterwards"! How easy it was to see the true hypothesis "afterwards"! But what word so sad as that word "afterwards"? The law of the fourth rule is intended to rob "afterwards" of its power to mourn. It is designed to put it out of the power of "afterwards," to disclose what "possibility" did not embrace. The fourth rule observed by juries will check these sad mistakes, this shedding of innocent blood. Have we not warning enough in history, in judicial annals, in daily life, to show us that circumstances can lie, do lie and will lie to the end of life?

They lied to Jacob. What but the lie of circumstantial evidence made the aged patriarch rend his garments, clothe his loins in sackcloth, and utter the wail of agony which would not be confessed, "I will go down into the grave, unto my son, mourning?" The case is instructive to show the power of falsehood told by circumstantial evidence. "It is my son's coat, an evil beast hath devoured him; Joseph is

without doubt rent in pieces." The coat was Joseph's, but all that followed was error made up of one false act, and false reasoning from the known to the unknown. The blood was the blood of a kid, not that of his child; there was no evil beast; Joseph was not rent in pieces, but in full life, on his way to the court of Pharaoh, and the house of Potiphar, to act an important part in Jewish and Egyptian history.

The reasoning of the patriarch was quite up to the standard of the common mind. His deductions were founded in the logic so much praised by the eulogists of circumstantial evidence. The blood of the kid looked like the blood of a man. Science had not in his day reached the analysis which detects the difference. He naturally excluded the hypothesis that the children of his own loins would slay their brother; he could not think of the other hypothesis—the simple truth—the sale of his son to the Midianite merchants for twenty pieces of silver; so that, with a conviction not to be shaken, he adopted the only hypothesis which could explain the transaction—an imaginary wild beast and a fictitious death!

Circumstantial evidence lied Joseph into prison when he reached the house of Potiphar. It lied that English girl to the scaffold. In all countries, in every age, among all peoples, it has lied its victims to the block, the stake, the scaffold or the dungeon. Its power is not confined to the tribunals of justice; a physician at the bedside of his patient sees the circumstantial evidence of disease; he sees (as he thinks) the circumstantial indications of a latent inflammation of the brain, he opens a vein, and the patient dies from the bloodletting, his hypothesis excluding all others which might explain the symptoms, is secret inflammation. A post-mortem examination shows there was no inflammation of the brain; but another disease which to bleed copiously is death. The true hypothesis he found afterwards. There is this difference between the physician and this prosecution. He excluded all but one hypothesis to save life—and they exclude all but one hypothesis to take it away. The physician must try to save, but the law does not make it a necessity to kill. It opens to every jury a path of safety.

Now, jurors, let us inquire if every possible hypothesis but the one sought to be proved is satisfactorily negatived in this case. Gordon died from a single shot wound in the head; it was in the back part of the head. If the locality of the wound excludes the hypothesis of suicide the wound itself excludes the hypothesis of two actors. There was but one shot; that shot might have been accidental. There may have been by the person who shot no intention to kill at the time of the shot. All that is proved may have been the result of after-thought. The idea of appropriating the property of the dead may have arisen after the accidental death and led to the hiding of the body and every subsequent step. Remember, the State assumes that two horses had already been appropriated and one of them sold the day previous. If a man had been found dead on the road, his horse near him and his watch on his person, the State has gone far to satisfy us that the property would have been taken. You see that the hypothesis of death by the accidental discharge of a pistol in the hands of either Bruff or Worrell and the subsequent appropriation of the property of Gordon, will explain all the circumstantial evidence in the cause. You do not know whether the shot was intentional or accidental. You can't know. You are reasoning to find out by deductions from what you do know how the fact was. You are reasoning on circumstantial evidence. The fourth rule tells you, as is told the jury in the case of the girl, that every hypothesis, but the one sought to be proved, must be excluded to a moral certainty before you can convict. How can you exclude to a moral certainty the hypothesis of an accidental shot and subsequent appropriation of the property? It explains the evidence and establishes guilt (if Worrell can be held responsible), but not the guilt of murder.

I stop a moment, jurors, here, to ask what you will say to this hypothesis, the hypothesis of an accidental shot and a subsequent appropriation of the property? You tell me it is not so probable as that the shot was intentional. You tell me "an intentional shot is much the best solution of the circumstances." Granted! Be it so! But what then? Are

you going to hang a man on your best solution? That is precisely what was done by the jury who murdered the innocent girl; by Jacob; by every jury and every man that ever erred, fatally erred, on circumstantial evidence. It is this best, this plausible hypothesis that ever seduces and leads astray. I deny your power! The law is against it. The law will not act on the best, but the only hypothesis, if there be "worst," "better," "best," the law will not choose between them. If there be room for choice, there is no room for conviction. That is the fourth rule. But I do not stop at this one hypothesis which you cannot satisfactorily exclude—exclude to a moral certainty. I give you another.

It is entirely possible, from all the evidence in this cause, that one of the two shot Gordon intentionally and that the other knew nothing of the fact till he heard the report of the pistol. There is a hypothesis which no human reason can "exclude to a moral certainty." Do you ask me, what consequence this hypothesis brings? I answer: If you know who shot, you may act on that knowledge and hold the shooter responsible for his act. If you know who it was that did not shoot, and he afterwards committed larceny, by appropriating feloniously the property of the deceased, the law will punish him for larceny. If he afterwards aided and assisted the man who shot to escape, he is guilty as an accessory after the fact. But if you only know that it was one of two who shot, there can be no conviction of either for murder; for, as I said, the chances are equal that you would select the wrong man; and therefore the law will not permit you to select at all. May not a murder thus go unpunished? Yes! Certainly, that is the result, and that ought to be the result, unless you are prepared to commit the more awful crime of judicial murder! That a man should lose his life by violence is a great calamity. Individual murder springing from unlicensed passions, horrible as it is, can never appall the mind as does the deeper tragedy of murder done in court. In the latter case the entire framework of society is shaken. The universal sense of insecurity arising from the proof that innocence is no shield, and government no protection! It is

a case in which government itself fails in the end and object for which it alone was created—it is the *"immedicable vulnus"* of a State.

You will remember, jurors, that the law does not require proof of these hypotheses. On the contrary, the law depends upon the principle that they must be excluded, excluded to a moral certainty by proof. They furnish a defense upon the bare suggestion of them, by showing that the evidence, the circumstantial evidence, of the State does not come up to the standard of the law.

The last rule I read in your hearing establishes the inferiority of circumstantial evidence generally, by declaring in no case ought it to be relied on if direct and positive evidence be within the reach of the prosecution. Let me further show its fallibility by supposing a case of direct and positive evidence. A man near the road in the thicket, or within the enclosure of Mrs. Stevenson's, looks upon the scene. He has a full view of Gordon and Bruff and Worrell, and brings every incident into this court in the order of its happening; the report of the pistol, the fall of Gordon, the hiding of the body, the departure. In a word, he tells you what did transpire, as it transpired, who shot, whether accidentally or intentionally, and what followed. If his relation showed guilt it would show what guilt, and in whom. You would not in such case have to grope your way by the guide of a most fallible and erring reason, to the unseen and unknown truth; nor call upon your imagination to say might it not have been thus, or so? You would be cut off from the dangerous exercise of speculation and conjecture. The only question would be credibility. Faith in the witness would be the only exercise of the mind. Is he honest, is he able? would be the only inquiries. If he were not able, the confusion of his narrative would show it. If he were corrupt, a cross-examination would lay bare his perjury. I would defy any perjured witness to give a false detail of that scene without detection. Yes, gentlemen, cross-examination in your presence, with moral power of the eye, can bring to the surface a perjury hidden in the heart of a false witness. But we have no remedy for the

erring reason of a juror, as he is passing from the known to the unknown. And when you attempt to place yourself in the position of my supposed spectator of the scene, and from your seats here undertake to see the transaction by the eye of reason, with the utmost respect for each, I must say that the chances are a thousand to one that you will blunder at every step.

On the supposition that Worrell is responsible for his acts the circumstantial evidence proves certainly a larceny—larceny by him; but it does not prove that he killed Gordon, nor that he knew he was to be killed and agreed to assist in the killing. It makes it probable that one or the other is true; it raises a strong probability of that; it makes it more probable that it is true, than that it is not. In a word (if he be responsible), the evidence makes it much more probable that he is guilty, than that he is innocent of the crime of murder. But that is the very reason why you must acquit him.[11]

I come to the question of insanity. If by taking a leap in the dark you have come to the conclusion that the defendant either killed or assisted in the killing of Gordon; if against the mandate of the fourth rule you have to a moral certainty excluded every possible solution of the evidence but that supposition which is essential to any verdict of guilty; if you have gone one step further, and found as a fact the express malice which only can make capital murder, I ask you to con-

[11] NOTE OF THE REPORTER.—Here *Mr. Wright* entered upon the inquiry, "If you will say (following the example of all who have erred on reasoning upon circumstantial evidence) murder was committed, what is the degree of that murder?" His argument involved a review of the facts of Bower's case, Jackson's case, and other cases of murder proved. Only, by circumstantial evidence, with an application of each to the law of Missouri, first declared in the dissenting opinion in the case of Bower, and since adopted by all the judges of the Supreme Court, in the cases of Dunn and Jennings, and the proposition advanced, was that a killing under unknown circumstances made only murder in the second degree. He enforced many decisions, laid down in his opening speech, and applied the doctrine to the evidence in the cause. The conclusion he reached from an analysis of the testimony tried by the legal tests, was murder, not capital. We do not give even a synopsis of his argument on this branch of the defense.

sider the inquiry, "Was Worrell a responsible being at the time of the homicide?"

I have already admitted the difficulty which meets me at this point. If the prejudice invoked by the opening speech of the prosecution did not rise at the call, or if rising it has since perished from your minds, under the force of the higher sense of justice, still I am met by difficulty in the investigation.

The form of mania which I have to treat, though complicated, is not the vulgar and palpable form of insanity. It is difficult of proof, for it does not strike the casual observer, and the more skillful are not here to aid us in the inquiry. The prisoner was forced into trial and is here in your charge, without the preparation which every process of this court was not able to bring. More than all, one phase of this mania so resembles crime as to be readily mistaken for it by the common mind; so that, to show him thus insane may be to press him with accumulated evidence of guilt. To these impediments the counsel of the prosecution would add another, by warning you against books which contain the light stricken out by long years of close and watchful contemplation of the disease of insanity. They would have you cut off from all supplies of knowledge exterior to yourselves, unless it be the knowledge which comes from the prosecution in such captivating simplicity. The knowledge which a glance inspires, the knowledge which men possess who have never seen the inside of a lunatic asylum, to whom insanity presents but the single phase of roaring madness, with the associate ideas of iron fetters, a straight jacket, periodical stripes and a dark prison! They would have you try this question by the rules and ideas which prevailed one hundred years ago in the courts of Great Britain, among men and judges, whose stupidity and profound ignorance of the subject of insanity have been pronounced throughout Continental Europe and our own country a reproach upon the English judiciary. They would make the law an exception out of the sciences, and deny to it the means of progress by which every other science advances. Jurors, there is a policy in this prosecution which is at war

with the letter and spirit of our laws. Heed not its counsel as you value all that men should hold dear.

I said in my opening that the apparent motive for the homicide, furnished by the appropriation of the property of the deceased, could not be disregarded in determining the state of mind of the prisoner. Sane men act from motive, and as sane men do unhappily find in property a motive to crime, such motive is held to be presumptive evidence of sanity. It is not always a true test! It is not decisive! Insanity has its motives also, and insane men act on motives such as move the sane to felony.

While this is so, if the circumstances of each case be closely scrutinized there will be seen something in the conduct of the insane man, which cannot be reconciled with sane action. If he starts with an apparent motive, it does not control his action for any length of time. If you keep your eye upon his action you will see that something becomes stronger than the apparent motive, and begets conduct inconsistent with, or at war with that motive. You will be startled by something at war with human experience, and which you cannot philosophically account for except upon the hypothesis of mental disorder. It is this law of man's action which troubles this prosecution. The evidence they bring of the conduct of the prisoner from the day of the homicide up to his confinement in jail in St. Louis, that remarkable flight, that remarkable pursuit of one thousand miles, is crowded with evidence of insanity.

The circuit attorney called it an ingenious flight which baffled the pursuit of an adroit and experienced police. Flight! There was no flight, and as to the other epithet, "baffled," if the prisoner had studiously designed to render his arrest a necessity, he could not have taken surer means to accomplish the object. The sole perplexity of Couzins arose from his own ingenuity. Thinking he was after a man who would naturally, by an instinct universal in felons, conceal his whereabouts by feints, all his anticipations were wrong. He marched and countermarched, but his own ingenious errors were corrected by the unexampled publicity and notoriety of

Worrell's manner of travel. No misplaced cunning of an old and skillful detector could long keep him from the track of the prisoner.

The circuit attorney was embarrassed by the first step after the homicide. He tells you that at first he thought the body was hid in "a strange place," but on mature reflection he concludes that it was the best hiding spot; and the reason he gives is that no sane man would ever think of looking for it at such a place! For this happy suggestion he is perhaps in some small measure indebted to the witnesses who swear that they never dreamed of searching for the body in the place they found it. You know, jurors, that the body in point of fact was not hid from the eyes of any man traveling eastward on that road. The evidence of Mr. Hutchinson puts this matter beyond controversy. The body was left in full view and the snow that fell afterwards made its covering. But if this, the middle of a public road, was so excellent a spot in which to hide a dead body, pray tell me why the saddle was carried a half a mile in the thicket and secreted?

Mr. Gale. In a tree-top.

Mr. Wright. There is no such evidence as that, and it is wrong in you to attempt to break the force of an argument by manufacturing testimony. The State has proved no such fact and the illegal effort to supply it by suggestion of counsel, concedes the force of the argument. He feels pressed by it, and the pressure is great enough to prompt him to an impropriety. But why was the saddle of Worrell carried away and concealed in a thicket? A saddle unknown, without mark, without anything to distinguish it from another saddle, and the saddle of Gordon, the bridle of Gordon, each peculiarly and strikingly marked, each capable of easy and certain identification, carefully kept and conspicuously exposed? Can that be explained by another impropriety? Why hide an unknown saddle in a thicket, and then mount the horse of a dead man, and ride him, seen of all men, on a public thoroughfare, down the identical road up which Gordon just previously traveled? And such a horse! Remarkable in every way, courting observation by the style of his

going and the color of his skin, and fixing his identity by a combination of "remarkables." A "remarkable lump," or "wen," or "knot," say all the witnesses, under his chin attracting the attention of the most careless observer; a remarkable star on his forehead, a peculiar snip on his nose, a singular growth of gray hair at the root of his tail, relieved by the uncommonly beautiful and perfect chestnut color of his skin. On such a horse, on such saddle, holding the reins of a beautiful bridle, Worrell rides publicly, without concealment, after having hid in a thicket a saddle which nobody could recognize, and left in the road the dead body of the man who rode it! He leaves him openly hitched at a rack, within two and one-half miles of the body, and goes into a grocery to be seen of men. He wears openly upon his hands the large fur gloves of the deceased, and on his person his watch, the seal of which contained the initials of Gordon's name. He speaks to every man he meets, he evinces no haste. He stops at the hotel in St. Charles before night, and he does not leave until after the ordinary breakfast hour next morning. He finds in the morning that the horse is known to be Gordon's horse. He evinces neither emotion, nor solicitude, nor caution. He rides to St. Louis, reaches there by 12 in the daytime, puts up at a hotel. He does not reach St. Louis, the residence of Gordon, in the night and pass through it under cover of darkness; he remains near two days, makes no effort at concealment, is conspicuous at the hotel, makes acquaintances, goes to the theater, etc. He is next at Vincennes, the terminus of the St. Louis railroad, at which place on a great thoroughfare of travel, the trains from our metropolis arrive every day. He stops at the most public hotel, and with every facility of travel, he remains at Vincennes four days. Bruff acting on the instincts of sanity, leaves him shortly after their arrival, and diverging from the great line of travel from West to East, veers off to the South. During those four days he is everywhere in the town; shows his pistol to the landlord, gets him to take care of it, wears the military cap, the military pants he wore at the scene of the homicide; introduces himself to Harrow, an old acquaintance, who had for-

gotten him; promenades the town with the landlord; visits often the depot of the trains from St. Louis, and attends a ball held in that depot! He talks freely of Western affairs, shows an intimate acquaintance with the troubles of Kansas, makes known his purpose to go East, changes his dress to the genteel costume of a gentleman at a party, and when it is over, resumes the apparel of the homicide. His extraordinary beard is still worn. The large fur gloves of Gordon he exchanges with the landlord; the seal bearing Gordon's initials takes the same direction; his watch is conspicuously worn, and his saddlebags (Gordon's) are carefully retained, containing Gordon's clothes. At length, he resolves to leave Vincennes to go East, and out of money, he sells two horses—Gordon's one of them, the other belonging to a man at Fort Leavenworth; and paying his own bill and that of Bruff, who under the name of Strong had departed without a settlement with his host, is careful to take and keep with some cherished mementoes of affection a receipt from the landlord, proving that he, E. Worrell, had at Vincennes, on the 6th day of February, paid the board of the said Mr. Strong and the expenses incurred by the keeping of the stolen horses. This paper, which the prosecution was so anxious to have, but of which they grew so suddenly sick when they saw it, was most cautiously preserved by the prisoner for the benefit of Mr. Couzins, whenever they should meet! Ready now for starting, he sees a gentleman and his lady from St. Louis going East, and forthwith introduces himself as Worrell and informs them he will do himself the pleasure of accompanying them. He does so, but he does not forget Gordon's saddlebags; he takes them with him; wherever he goes they go; not in the baggage car, but with him on his seat, or over his head on the rack of the passenger cars. On board the cars he introduces himself to everybody, male and female. Although, as you learn from all the evidence, from every witness, soldier, officer or citizen, a gentleman of education, refined in manners and habitually observant of the proprieties of politeness, without the ceremony of introduction, he addresses the passengers of both sexes, indiscriminately and perpetually. His

remarkable beard, his remarkable military pants, his military cap and the not remarkable saddlebags of Gordon, keep his company without change until he reaches Pittsburgh. There McGee induces him to have his mustache taken off, and the change wrought is so great that he is not recognized by a gentleman who had traveled on the cars with him from Vincennes. "You have the advantage of me," said the gentleman, "I do not know you." "I am Worrell, do you not know me? This is the difference"—pointing to the absent mustache. Here was a suggestion which no sane fellow could disregard, but he is solicitous to disclose even an accidental and unintentional disguise.

At Baltimore he gets into a conversation with a stranger on the affairs of Kansas. The circuit attorney, in allusion to this strange interview, exclaims, "If all the men who get excited on Kansas be insane the hospitals of the country won't hold them!" The prosecutor dodges the point, gentlemen; the point of the incident is that there was no dispute, no disagreement; but on the contrary, a perfect coincidence of opinion on the subject between Worrell and the stranger, and yet Worrell became so excited as to require the interference of another. There is no solution of that excitement but the senseless irritability of mental disorder. The effort to evade the fact proves its power even on the mind of Mr. Gale. Little as he affects to know of insanity, he feels the force of this parenthetical fact.

At Baltimore he purchases clothes and a trunk. Now the saddlebags may be no longer needed to carry their contents; the military pants may be thrust aside; the military cap need be no longer worn and the boot with its identifying patch may be left off! He is at last near home and kindred. One day may bring him to Dover, where he will meet those two (pointing to his father and mother), who now sit by his side and watch the currents of this trial. Their presence will inspire the absent missing instinct of self-preservation! Surely he will rid himself now of all trace of crime, and as far as may be of every mark of identity. There is a Dover, Maryland, and a Dover in Delaware! "I am going to Dover," he

said to McKee. Well he did! he went to both Dovers; but wherever he went he wore the cap and military pants and Gordon's watch with the watch paper in it, and Gordon's saddlebags and the one boot with the identifying patch! He visits first his friends and relatives in Maryland. They had no suspicion of crime, but his strange action and curious conduct proclaim to them his mental disorder. It is told in the depositions from Maryland. At last he is in Dover of Delaware. His parents reside there. He puts up at a conspicuous hotel; he visits his father and mother and goes everywhere publicly; he remains for days; the papers having carried thither news of the fate of Gordon. The police are in the town; Wentz, a constable, and perhaps the Philadelphia policeman; they are consulting three lawyers as to the best mode of arrest. Worrell learns they are after him. He does not fly; he does not attempt it nor does he secrete himself. He goes to bed at the hotel; before doing so he hangs up his vest upon his bedstead, with Gordon's watch in it, and Gordon's saddlebags near him. The boot with its patch is there also and the military cap and the military pants; and in his trunk the frame of the daguerrotype, and in his pocketbook with the hair of a loved one, and some other tokens of affection, is the receipt of money paid for the board of Mr. Strong, and for the keeping of three stolen horses. The police, with Couzins at their head, at a late hour in the night, rush into the room. Their preparation was such as a proper caution would dictate to arrest a desperate, bloodthirsty, sane felon. Their action was suited to that idea. But they only encounter a question, and it is full of significance: "Why did you not come in the daytime?" Couzins has time to examine his arm for a tattooed mark upon it. It did not require time to see seven rings on his fingers! Every man and woman, in the cars, at hotels, on the streets, at the theater, or at balls, saw seven rings on the fingers of this flying felon! This refugee from justice, this sane criminal, urged by the instincts of self-preservation to hide his identity and "baffle"—yes, "baffle"—that is the word used by the most skillful detective who ever won police laurels! He changed his name, say the prose-

cution. You do not find it so when left to himself. You see that, Bruff away, he is always Worrell, conspicuously Worrell, without an alias. But little can attach to the fact if it were otherwise. The moment you assign a motive, a rational motive, to the change of name, you show the insanity of action, by a series of acts irreconcilable with that motive. Did he change his name to avoid detection? Then why wear seven rings on his fingers? Why wear the watch of Gordon? Why keep his saddlebags? Why not throw them into a river? Why wear his gloves? Why cling to the speaking boot? Why take and keep the receipt? Why preserve the frame of the daguerrotype? Why spend four days at Vincennes? Why cherish and cling to the evidences of his crime? Why draw upon himself the universal eye by a notoriety of travel past all parallel? Why wear the military pants and the cap? Why show his pistol? Why the words, "that is Gordon's watch and those are his saddlebags?" Why the hearty and willing recognition of Gould, of the landlord of St. Louis, of Hutchinson, of Taylor, of the man to whom he sold the horse in Montgomery?

I defy ingenuity to explain his conduct by any test of sanity known among men. Did he wish detection? Did he desire to be brought to justice? Was he inspired by that false heroism which courts a public execution, an ignominious death upon the scaffold? Such proclaim their guilt with ostentation. Even the prosecution impute to him no such guilty glory. Mr. Gale tells you the purpose of the prisoner, and his calculation was to employ me and escape justice through my imputed necromancy! If that were true, it would furnish decisive proof of his insanity. I have said there was time while he lay in bed at Dover for Couzins to see his tattooed arm; but in all time of his travel from the scene of the homicide to his arrest, there was no time when any observer could see in Worrell any solicitude, any anxiety, any perturbation of soul, any indication of remorse.

The circuit attorney wonders how he could listen unmoved to the words of the negro at St. Charles, which brought the dead body of Gordon to his eyes. He is amazed that with

"the blood of Gordon on his soul" he could sit in a theater, finding an interest in its mimic scenes. He is horrified that Gordon's specter had not power to drive him from the ball-room. Let him look to the records of insanity found in these books, and the marvel will cease. These facts which so startle him are the very marks of that insanity, which shows no appreciable lesion of the mental faculties in which the victim of the disease "never says a foolish thing, but exhibits his insanity only in his actions and his sentiments."

Thus, what fires the prosecutor with indignation, happens to be precisely what ought to excite his commiseration. I believe that if Gordon's form appeared stark and stiff before us now, the prisoner would be unmoved at the sight. Is it because he is a desperate villain made callous by a life of crime? Is it because a long career of wickedness has eradicated humanity from his nature? We shall see; we shall see; we have his life before us from youth to manhood, and can answer the question. It comes to us in no "questionable shape." By the witnesses of the State, officers, non-commissioned officers and privates, by civilians, by men of all avocations in life, and in all places withersoever an unhappy destiny has carried the prisoner, so as to be seen and known of men, the life is written the same way, the same story is told. Whatever else in this cause may be uncertain, it is certain that we have a correct view of the nature and character of the prisoner, a fact of the last importance in determining the question of his responsibility to law. But if we were ignorant of his past, if we knew nothing of the man but what has been disclosed of his conduct from the death of Gordon to his confinement in the St. Louis jail, is there not something in that narrative which perplexes you by its strangeness? Do the annals of crime or your own experience furnish anything like it? Is there not that in it which makes us pause, which demands explanation, something that should press upon the solicitude of jurors clothed with the power of life and death?

The circuit attorney finds that the murder was determined upon at Hutchinson's the previous night. He thinks the con-

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duct of the prisoner there worthy of particular observation; and so do I; but we draw opposite conclusions from the same premises. So soon as the travelers enter the house of Hutchinson, Worrell pulls out his pistol, loads it in the presence of all, and lays it on the mantelpiece in full view, conversing the while with Gordon, who sits by his side. Is that the action of a sane man while meditating murder in the presence of his victim? Is it the conduct of one who responsibly conceives crime and desires to escape justice? This courting of observation to his meditated deed, is it within the range of sane experience? I know there is great variety in the conduct of crime; no two men commit it exactly alike; the action is varied by the circumstances, condition and character of the criminal; but crime has nevertheless a distinctive aspect to be seen and recognized. We know its countenance under every variety of feature. The conduct of the prisoner is outside the circle of variety. It impresses the mind with the idea strongly presented in our homely vernacular, "that there is a screw loose somewhere." No indignation kindled by the melancholy fate of Gordon can render us insensible to this impression. It lingers about us, haunting the reason of every fair man, and suggesting inquiry to know more.

We go back a few days prior to the homicide and we find the prisoner is a deserter from the army of the United States. He has just left Fort Leavenworth, and passing down the Boonslick road he has sold a stolen horse and rides another, stolen also. He is a sergeant, an orderly-sergeant, who has risen from the ranks by his merit, and is on the eve of higher promotion. He is loved and respected by officers and men. Why did he desert? He is the best sergeant in the command. He has committed no offense, he does not leave from fear of punishment or disgrace, or the apprehension of lessened honors; and he joined the army from choice six months before. He has the pride of a disciplinarian; he loves the life of a soldier; why does he desert?

The evidence explains his conduct. You see him in the hands of four or five soldiers, an insane madman. You see him rushing to the top of the stairs with a loaded revolver,

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without a cause, and with a frantic look scattering a frightened multitude. You see him passing, after night, a sentinel whose duty compelled him to shoot. You see him the victim of insane impulses, which he has no power to resist. The prosecution is hard pressed by these facts. Mr. Gale endeavors to explain the affair of the revolver by holding up Worrell as so strict a disciplinarian that, for mere loud talk in open day he would kill soldiers and citizens! The argument is a suicide in logic, for such disciplinarian would not, after night, violate at peril of his life, a discipline essential to the safety of every military post.

Up to the hour of his desertion, in all his life, who ever connected the name of Worrell with an act or sentiment of dishonor? His life, as I said, is before you and however you decide this cause, the fact is overwhelmingly established that a more honorable, upright, honest young man than Edward Worrell never enlisted under the banner of his country. "The past at least is secure." The gallows cannot rob him of his character for gentleness; for high and honorable aspirations; for a scorn of all meanness; for a refined manliness; for invincible honesty. And now I ask you, jurors, when before in your experience, in the larger experience of humanity, did it ever occur that such a man, on a sudden, in a moment, becomes a horsethief and murderer? I put the question to your consciences. I put it to the prosecution and especially to him (Mr. Bay) who is to follow me. The annals of crime do not furnish a case. I defy one well authenticated case of such sudden voluntary revolution of the moral nature of a man. Insanity has presented this perversion a thousand times.

"I took an interest in Worrell," said the witness for the State—; "and told him I was glad to witness his promotion."

Who did not take an interest in Worrell wherever he has been? Was he not always an object of interest and regard? It is not simply that from the camp and from civil life, no whisper of imputation can be brought against him; but the evidence is positive and affirmative and universal—that for all the qualities of a man which recommend him to the heart,

the poor prisoner had no superior. What is insanity but the sudden and prolonged departure from the normal standard of character, without any known external cause?

In 1853, Worrell enters the office of Attorney Morris, near Fort Leavenworth, to procure the aid of that gentleman in obtaining his honorable discharge from the army. He had a cause which, if presented, would have procured his discharge at once, but he conceals it; he never hints at it; he presses his case upon other and untenable grounds. If he had disclosed to the attorney his epileptic disorder—of which you have the fullest proof—his discharge would have been sent by return of mail. It is carefully concealed. The lawyer gives him no hope upon the case presented. Our treaty with Mexico had plighted the faith of the nation to the suppression of Indian hostilities. That faith was almost broken by the inactivity of our government and the small numerical force of our army. Not a man could be spared. You know the result of that interview—the touching melancholy and despair of the young soldier, and the interest he awakened in the counsellor, and the impression made upon his mind then as to the insanity of his client. What would he have thought if he had known the suppressed fact? What do you think now in the light of the evidence, which establishes that no epileptic can either be enlisted or remain in the army of the United States?

Jurors, I cannot dwell on what you have heard from the lips of his mother. Her words surpass in power all the elaborations of any advocate. "In such moods, and many a time, he has thrown his arms around me and implored my forgiveness for what he could not help, and then fall on his knees by my side and pray for strength from God to resist such strange impulses." Poor young man. This disorder of the mind is inherited. It is on both sides. His mother is a Ringold; the Ringolds and Worrells are familiar with insanity. Suicide and the lunatic asylum make a part of the history of both houses.

His education has not been neglected; he was and is an only child—the child of enlightened, refined, pious parents. They

speak for themselves. There is a power in their presence and mode of testifying which drew from the circuit attorney the exclamation: "I believe every word they say!" But we can't educate away disease and misfortune. His epileptic disorder came upon him at seventeen, and his irresistible impulses evinced themselves earlier. But, neither singly, nor both together, have they been able to prevent the growth of high aspirations, kindness of nature, gentleness of disposition, integrity of soul and honesty of purpose.

"Why did not," exclaims the circuit attorney, "why did not his epileptic fits come upon him before the September term of this court?" I can't answer that. God knows; the most expert of the earth in disease cannot tell—but one thing is certain, the fact is conclusive against feigned insanity. If the insanity were feigned he would have had them on the cars; at all convenient localities; they would have been seen of men everywhere; they would have been public convulsions. They were far otherwise. A watchful mother, imprisoned with her child, sometimes an aged father; sometimes a few female friends, who are not ashamed of sympathy for the unfortunate, were the witnesses. The jailer even was not notified. But I do not make battle against feigned insanity. The argument would be an insult to the understanding. The only trouble is to get the thing, supposed to be feigned, recognized as insanity.

The witnesses who saw Worrell on the Boonslick road are brought to say whether they saw any indication of insanity in the glimpses they had of him, and they answer no. This evidence is worthless in any case of insanity which does not perceptibly hurt the intellectual faculties. They did not hear him say "any foolish thing;" they thought him "a perfect gentleman," and "well educated." They had no occasion to hunt for insanity, and if they had—and insanity existed without doubt, but in that form—not one of them would have found it out.

It is said by the prosecution that insanity must be affirmatively and satisfactorily established by the defense, beyond all reasonable doubt. I deny the proposition; it is not law,

and it shocks the moral sense to assert it as a rule of judgment. "Murder must be committed by a sane person." The law has so far shifted the onus, as to presume sanity. It is but a presumption—an arbitrary, artificial presumption—liable to be repelled by other presumptions, so that whether balanced or completely overthrown by other presumptions, the affirmative rests on the State.

There is said to be a presumption of law that one in the possession of the property recently stolen, is the thief; but that presumption may be balanced or repelled by proof of good character, which raises another presumption of innocence. If I were sitting as a juror in a case of life and death, and on the whole proof could not satisfactorily determine, whether the prisoner was sane or insane, there is not a power on earth strong enough to make me give judgment against him. A verdict of death signed by me, when I could not determine whether the prisoner was or was not a being responsible to human punishment! I would act on the presumption of the law of insanity till I heard the proof, and then if the presumption was staggered or balanced, it could no longer have power over my conscience. Something more would be required to move me to judgment.

Once more, gentlemen, I return to a ground of defense; it is the last which I make for the prisoner, if you should hold him amenable to human tribunals. If you are not satisfied with his total irresponsibility to law, by reason of insanity, you have a right to regard his mental disorder; to see whether his mind was clouded by disease or any other cause, so as not to be in that specific condition necessary to the perpetration of murder in the first degree. The law does not forbid in such case you should "temper the wind to the shorn lamb." You have in such case power to save life, by a verdict of murder in the second degree.

And now, jurors, the defense is ended. I think it ought to be successful, but you are to determine. The lawful power of death is in your hands, the life of my client is like that of the sparrow which the Greek boy held in his closed hand before the Oracle, with the words "alive or dead?"—intend-

ing, if the answer should be "alive," to crush its life out; if "dead," to open his palm and give the captive liberty, with this difference in the cases: The life of the bird hung upon the caprice of a mischievous youth; that of the prisoner hangs upon the judgment of his peers, sitting to administer the humane and merciful spirit of our law. You will bear me witness that the defense has, in its entire scope, addressed your intelligence and reason only. It has never made one appeal even to that sympathy from which man should never be quite shut out. I have been alone—alone, against a powerful array of talent and learning, combined for the destruction of the prisoner. I have been at great disadvantage in meeting them, but I have, in behalf of the prisoner asserted no doctrine, advanced no principle of law or morals, which will not survive the passions of this hour and continue to be cherished as true by all good men. Mine is the only voice that has been raised for the prisoner, and now that voice is still.

MR. BAY, FOR THE STATE.

Mr. Bay. Gentlemen of the jury: Repeatedly during my professional life have I been called upon to defend, and in some few instances to prosecute, persons charged with a violation of the criminal laws of the land; but never under circumstances so painful, and responsible as those which surround me on this occasion.

Gladly would I have evaded the task could I have done so without disregarding my obligations to society and the requirements of my profession; but the necessity of a prosecutor in the attainment of public justice is equally as great as that of a judge or jury. It is true the State is here represented by the regularly appointed officer of the law, but to have imposed upon him the entire labor of the prosecution, under the peculiar circumstances of the case, would have been extremely unkind, inasmuch as the crime was not committed in his circuit, and the witnesses supposed to have any knowledge of facts pointing to the perpetrator, reside beyond the

limits of the circuit, and some few beyond the limits of the State.

To have imposed therefore the preparation of the case upon the circuit attorney would necessarily have required him to traverse the whole country in search of testimony, at a heavy expense without any legal claim for reimbursement, and to the entire neglect of those duties which more legitimately belong to his office. But independently of all this, no injury is likely to result to the prisoner from the fact that Gen. Coalter and myself are here to aid the State, for he is represented by the ablest advocate in the West, and one who stands at the head of his profession in the criminal department of the law.

The accused has reason to be thankful to the State's counsel for many acts of indulgence on their part. Numerous depositions have been filed and read in his behalf, most of which could have been suppressed for irregularity. The acts, moreover, deposed to, are in many instances irrelevant, having no bearing upon the issue; and the evidence is chiefly hearsay; witnesses deposing to facts not within their personal knowledge; but gathered from idle rumor; yet we have permitted these depositions to be read in evidence and have given the prisoner the full benefit of them, simply reserving the right to comment upon their weight and character.

It would have been gratifying to us if in the course of this laborious investigation anything had been elicited to exculpate the prisoner; but we regret to say that every fact and circumstance detailed in evidence point with unerring certainty to Worrell and Bruff as the perpetrators of the murder; a murder committed solely for gain and under circumstances of the most cruel and barbarous nature.

The learned counsel who has just so eloquently addressed you has placed the defense of his client upon four grounds:

1st. That the evidence does not show to the exclusion of every other hypothesis that Worrell killed Gordon.

2d. That if the evidence does establish the fact that Worrell killed Gordon, it also shows that he did it in an attempt

to commit a felony, and as he is not so charged in the indictment, he cannot be convicted of murder in the first degree.

3d. That there is no evidence of express malice, which is essential to constitute murder in the first degree.

4th. That admitting that Worrell committed the offense charged in the indictment, still he was at the time laboring under mental alienation, or that condition of mind called homicidal monomania, complicated with epilepsy.

I shall endeavor in my argument to follow the path the learned counsel has opened for me, and take up each proposition in the order in which he has discussed them.

It is in evidence that Sturgeon and Walker left St. Louis for St. Charles in the train on the 13th of January, 1856, for the purpose of taking a trip up the line of the North Missouri Railroad as far as its intersection with the Hannibal & St. Joseph Railroad. Gordon was to accompany them and started from St. Louis on horseback. Previous to starting he purchased, at the suggestion of Walker, a pair of fur gloves, similar to those shown in court by Walker. The three met in St. Charles on the evening of the same day and stayed all night at the house of Mr. Wentz, a division engineer. On the next morning (the 14th) Walker, Sturgeon, Gordon, Wentz, Pratt and a negro boy belonging to Wentz started up the line of the road. On reaching Burlington, in the northern part of Boone County, they had two daguerrotypes taken, each containing a group. They then proceeded up to the intersection, and it was arranged that on Gordon's return he should take one of the daguerrotypes (which had been left with the artist to be finished) to St. Charles to be deposited in the office of Wentz. The party started back and reached Huntsville, in Randolph County, on the evening of the 20th. On the next day (21st) about noon they left Huntsville; Walker, Sturgeon and Pratt for Jefferson City, and Gordon for St. Louis. Wentz had a short time before started down the line of the road, and at Warrenton sent the negro boy ahead to St. Charles. Walker's party remained one day in Jefferson City and then started for St. Louis by way of the Pacific Railroad, reaching the latter place on the 26th. They

were surprised to find that Gordon had not arrived. Several days elapsed and they began to apprehend something had happened to him. Walker learned from a Mr. McDonald, a railroad contractor, that Gordon had been seen on the 24th on the Boonslick road by a Mr. Ferguson, in company with two men, all on horseback. Walker started the next morning on the locomotive for St. Charles, having directed McDonald to go up on the Pacific road, and return by way of the Boonslick road, and ascertain if possible where Gordon was last seen. Walker left St. Charles and proceeded up the Boonslick road, making inquiry at every house until he reached the residence of a Mrs. Stevenson, where he learned that a negro boy of Mrs. Stevenson had found a dragoon saddle in a thicket about half a mile south of the road. This led to a thorough search of the thicket, which is a dense pin oak thicket extending along the road, about one hundred yards and widening as it goes south.

It is unnecessary, gentlemen, to recapitulate the circumstances attending the discovery of the body. The witnesses have detailed them with great minuteness, and you have before you a diagram of the ground showing the meanderings of the traveled portion of the road and the place where the body was concealed and found.

I will now undertake to connect Worrell with the murder.

It is in evidence that he and Bruff deserted from the army at Fort Leavenworth on the 7th of January. The prisoner was a first orderly-sergeant and Bruff a private. Mr. Ferguson states that about noon on the 24th of January Worrell, Bruff and Gordon came riding up to his house on horseback, Gordon riding a Chestnut sorrel. Worrell was leading a horse which he sold to witness. They remained nearly half an hour. The horse was afterwards claimed by another person, who alleged that it was stolen from him. Witness recognizes prisoner as the man who sold him the horse, recognized him in the jail at St. Louis. You will recollect what passed between them in jail with respect to the horse. Witness resided on the Boonslick road, 11 miles west of Warrenton.

Mr. Pace saw prisoner on the 24th of January at Mr. Jones'

about two miles east of Ferguson, in company with two other men, all riding horseback, one of whom was Bruff. Witness was on his way to St. Louis in company with Mr. Hervey. This was about 2 o'clock in the afternoon. Witness remained all night at Warrenton, got an early start the next morning, and as he passed Hutchinson's saw Worrell sitting upon the steps. He called to witness and said, "You have got an early start." Witness recognizes the prisoner as the same man.

Mr. Stewart says he resides in Warrenton, knew Gordon; that on the 24th of January, about 4 or 4½ o'clock in the afternoon saw Gordon as he passed through Warrenton; Gordon was riding a chestnut sorrel horse, two men were in company with him; recognizes prisoner and Bruff as the men; they stopped some time at the door of Sander's hotel and then rode off together, traveling east.

Mr. Camp states that he resides in the west end of Warrenton, saw Gordon in company with two men, all on horseback, on the 24th of January, between 4 and 5 o'clock in the afternoon. Witness was personally acquainted with Gordon. Gordon was on a chestnut sorrel horse, and rode up to witness' fence, and spoke to witness. Witness asked him to stay all night. Gordon declined, saying he was going to Hutchinson's. Witness is a contractor, and noticed the other men very particularly, supposing they were new contractors on the road. They rode off together, going east. Witness recognizes prisoner and Bruff as the men he saw in company with Gordon.

Mr. Hutchinson says he keeps a house of entertainment on the Boonslick road, about four miles east of Warrenton; that about dark on the 24th of January, prisoner, Bruff and Gordon came to his house and remained all night; that shortly after they came to his house, he saw prisoner loading a large pistol; they left together after breakfast the next morning, going east. It was snowing when they came, and about the time they left it commenced snowing again, and continued to snow most of that day. It is about 40 miles from my house to St. Charles. Saw prisoner and Bruff in the St. Louis jail about the 27th of March following; recognized them, and

they recognized me. Prisoner inquired about my family and about the condition of the road. The body of Gordon was found two and one-half miles east of my house.

I would here remark, gentlemen of the jury, that Gordon was never seen alive after he left Hutchinson's house.

Mr. Pace, the witness to whose testimony I have already referred, says that about five miles east of the place where the body of Gordon was found, prisoner and Bruff overtook and passed him. Gordon was not with them. Bruff was leading a horse without a saddle, and prisoner was riding a chestnut sorrel. Some four miles further east I passed them again; they were in a grocery, and their horses were hitched to a fence close by. While watering my horses at a creek near Kenner's, they again overtook and passed me. It was snowing very hard, and prisoner remarked that "it was a very disagreeable day." Witness recognized the prisoner as the man who spoke to him, and Bruff as the man who was in company with him. The testimony of Mr. Hervey corroborates Mr. Pace's.

Clay Taylor, another witness, met prisoner and Bruff about noon of the 25th of January, on the Boonslick road, about 15 miles east of the place where the body was found. Witness had been to St. Louis and was returning in a buggy to his farm in Warren County. Col. White was with him. Prisoner was riding a chestnut sorrel horse and Bruff a dark brown and leading one of the same color. Col. White called the attention of witness to Worrell's horse by saying "That is a damn fine poor man's horse." I then noticed the horse particularly; he was fine looking and carried himself well. Witness further states: I went to the St. Louis jail on the night prisoner was brought there, asked him if he recognized me; he looked at me closely and remarked, "I think I do." I then asked him to state where he had seen me before. He replied, "I am not certain whether it was at Warren or on the road this side." I then asked him if he recollected meeting three buggies on the day of the unfortunate occurrence. He said he thought he did. Mr. Sturgeon was with me at the jail and told prisoner that he was a friend of Gordon and

would like to know if he suffered after he was shot. Prisoner replied (hanging his head), "He did not." Several days after this I again saw prisoner in jail; told him that Mr. Gordon was a particular friend of mine and co-laborer on the railroad, and I wanted to know if he suffered any after he was shot. He replied, "I can assure you, sir, he did not."

Martin McMahon states that in January, 1856, he was boarding at Christian Way's tavern in St. Charles; that about dark on the 25th of January prisoner and Bruff came to the tavern and remained until next morning. They had three horses. The next morning after breakfast they started in the direction of St. Louis. Prisoner was riding a chestnut sorrel horse; after he mounted his horse a black boy belonging to Mr. Wentz went up to him and asked him if he had bought that horse of Mr. Gordon. Prisoner replied, "No;" that it was a horse he had brought down the country.

You will recollect, gentlemen, that this is the black boy who went up the line of the road with Walker, Gordon, Wentz and others on the 14th of January and had charge of their horses.

Hartwell Richards states that in January, 1856, he kept a house of entertainment on Broadway in St. Louis; that between 11 and 12 o'clock in the morning of the 26th of January prisoner and Bruff came to his house, remained all night, and left next morning between 10 and 11 o'clock, stating that they intended to cross the river into Illinois. They had three horses with them, two bays and a chestnut sorrel. The sorrel horse had a knot under his jaw. Prisoner called himself John Ross, and Bruff went by the name of Charles Strong. It is about 18 miles from my house to St. Charles. I recognize the prisoner as the one who called himself John Ross; have seen Bruff since this trial commenced; have conversed with him, and recognize him as the man who called himself Charles Strong.

Mr. Gould states that in February, 1856, he and his father kept tavern in Vincennes, Ind., about 150 miles from St. Louis; that on or about the 2d of February prisoner and Bruff came and put up at their house. Prisoner remained

until the 6th, when he left in the train for the East. Bruff left two days before. They brought three horses with them, two bays and a chestnut sorrel. The sorrel had a knot under his jaw. Prisoner sold the sorrel horse and a saddle and bridle to my father. The saddle was a plain black saddle, the pommel having the appearance of having been rubbed. Mr. Morgan and Mr. Signer came to Vincennes from St. Louis and wanted to see the horse, saddle and bridle, and we showed them to them. Prisoner also traded to my father a pair of gloves and a watch seal; the gloves were precisely like those shown in court by Major Walker.

Mr. Couzins arrested prisoner in bed, in Dover, Del., between 1 and 2 o'clock in the morning of the 21st of February. Witness found in the vest pocket of the prisoner a watch which he afterwards handed to Major Walker.

Major Walker produced this watch in court and you will recollect, gentlemen, that he stated that it was the same watch Couzins gave him, and he recognizes it as the watch that Gordon had carried many years. Mr. Wentz also recognizes it as the watch of Gordon, having seen and examined it frequently. Couzins further states that he found in possession of the prisoner at the time of his arrest a pair of saddlebags and a daguerrotype case, corresponding to the one that Gordon was to take to St. Charles. At the depot in Smyrna prisoner admitted in presence of witness that the saddlebags and watch belonged to Gordon.

Mr. Wentz says that while in the depot at Smyrna he had the watch in his hands, and remarked to Mr. Couzins in presence of Worrell "that he knew it was Gordon's watch," and that Worrell said, "Gentlemen, that was Mr. Gordon's watch." Wentz had the saddlebags on his knee at the same time, and Worrell remarked (pointing to them) "And those also were Mr. Gordon's." Couzins further states that at the depot in Smyrna some person asked Worrell who killed Gordon, and why he did not say something about it. Prisoner replied, "The other man is a Mason and I don't like to say anything about it." Couzins also asked him whose cloak it was that was left at Vincennes. Prisoner asked if there

was any blood on the cloak and said, "That cloak would tell the tale."

Mr. Morgan testifies that on the 13th of January, in St. Louis he let Mr. Gordon have a chestnut sorrel horse, to go up the line of the North Missouri railroad. The horse was fine looking and had a knot under the jaw about where the curb would come. He also took with him a saddle and bridle belonging to Mr. Signer, which was in my possession. Prior to this I had used the saddle, and on one occasion carried up on the pommel some iron hinges and tools which scratched the pommel and left on it a red spot. I put some blue ink on the spot. The bridle was nearly new, and I had taken out the bit, and put in its stead an old Snaffle bit. Some time after the murder of Gordon, Mr. Signer and myself went on to Vincennes, and there saw in possession of Mr. Gould the horse, saddle and bridle. I recognized them immediately.

Mr. Signer states that on the 13th of January, in St. Louis he loaned Mr. Gordon a saddle and bridle to take with him up the line of the North Missouri railroad. Some time after the murder of Gordon Mr. Morgan and myself went to Vincennes and I there saw the saddle and bridle in possession of Mr. Gould, and recognized them at once.

I have thus, gentlemen of the jury, brought together, stripped of their verbiage, the leading facts and circumstances connecting the prisoner with the charge in the indictment, and so conclusive are they of his participation in the homicide that the learned counsel has not ventured upon an argument to establish the possibility of the existence of any other hypothesis but the one involving his guilt. In lieu of it, however, he has opened his battery upon circumstantial evidence in general; denouncing it as uncertain and unreliable; tending to lead your minds to a wrong conclusion, and warning you against placing too much reliance upon it.[12]

But the learned counsel has endeavored to bias your minds

[12] Here *Mr. Bay* went into a lengthy description of the nature and character of circumstantial evidence, and the rules of law governing it; applying the rules to the case at bar; quoting largely from various authors, and the opinions of eminent jurists. This part of the speech occupied upwards of two hours.

against this character of evidence by parading before you the case of the servant girl who was executed in England for the murder of her mistress, when the homicide in fact was committed by another. He has also quoted one or two other cases in which innocent persons charged with the commission of high crime have been convicted upon circumstances. These cases are mentioned in the books as having occurred at an early period, and are as familiar to the law student as the story of "Mother Hubbard" is to the school boy in his apron. Upon all prosecutions for murder, in which the State has to rely chiefly upon circumstantial evidence, they are galvanized into life and held *in terrorem* over the heads of jurors. Upon examination of these cases it will be found that but few circumstances tending to establish guilt, were proved. Take, for instance, the case of the servant girl charged with the murder of her mistress. The proof was that the only persons found in the house were the murdered mistress and the prisoner; the doors and lower windows were found closed and secure and upon the presumption that no other person could have had access to the house, but herself, she was convicted and executed. No motive whatever was shown for the perpetration of the crime, and it did not even appear in evidence that any difficulty had occurred between her and her mistress. The rules of law governing circumstantial evidence were not strictly enforced in her case, for the circumstances did not by any means exclude every other reasonable hypothesis but the one contended for by the government; for it turned out afterwards by the confession of the murderer that he gained access to the house by means of an upper window.

But suppose it to be true that in the history of criminal jurisprudence some few persons have suffered upon circumstantial evidence for crimes which they did not commit; is it not also true that for every such case you will find ten who have been wrongfully convicted upon positive evidence. A long train of circumstances well connected, each one perfectly consistent with the others, established by different witnesses, who have had no opportunity for concert or agreement, can-

not lie; but witnesses may, and often do, and the experience of mankind shows that jurors are often imposed upon by witnesses who testify under strong bias or prejudice, and by so doing give a coloring to the case which the facts do not warrant; more particularly is this the case when the testimony goes to the jury with an imperfect cross-examination. A juror cannot always know what is transpiring in the breast of a witness. A well-trained witness will sometimes testify as if he felt no interest in the case, and was indifferent as to the result, when in point of fact he is panting for the conviction of the accused. How often is it that the executive of the State is compelled to interpose the pardoning power in cases of wrongful conviction upon positive evidence. A wrongful conviction upon circumstantial evidence is an event rarely met with, and I will venture the assertion that the counsel, whose experience in criminal practice is large and extends over a period of thirty years, cannot point to a case where an innocent person has been convicted and executed upon such evidence. The danger resulting from this character of evidence does not lie in the possibility of a wrongful conviction, but in the proneness of jurors to let the guilty escape upon vague conjectures.

Mr. Starkie, speaking of this character of evidence, in his book on the law of Evidence, says, "To acquit upon light, trivial and fanciful supposition and remote conjectures is a virtual violation of the juror's oath, and an offense of great magnitude against the interests of society, directly tending to the disregard of the obligations of a judicial oath, the hindrance and disparagement of justice, and the encouragement of malefactors."

If, gentlemen, you abolish circumstantial evidence, or cease to give it the weight that it is entitled to upon every principle of human reason, you will destroy every safeguard that the law has thrown around your persons. The passions will go unbridled, and murder will become as common as the lowest grade of misdemeanor. You will not be able to travel upon the highway, or repose upon your couch at night with any security against the bloodthirsty assassin. High crimes

are almost invariably committed under circumstances of secrecy. The murderer abides his time and goes forth in the dark hours of the night to do his bloody work. Conscious that no eye is upon him but the Almighty's, he strikes the fatal blow, and under the cover of darkness makes his escape. If he cannot be made to suffer the penalty of the law except upon the testimony of an eye-witness, the sooner your penal code is abolished the better, for then man will look to himself alone for protection and provide means accordingly.

But, gentlemen, we are not confined in this case to circumstantial evidence. The declarations of the prisoner to Couzins and Wentz at Smyrna, and to Sturgeon and Taylor in the St. Louis jail, establish his participation in the homicide, but I shall reserve my comments upon these confessions for another branch of the case. But Major Wright says that the State has failed to prove that the prisoner inflicted the wound which resulted in the death of Gordon. If he means by this that the State has not produced a witness who saw the transaction, then he is correct; but if he means that the State has produced no evidence tending to show that Worrell did inflict the wound, then we differ widely in opinion. The evidence disclosed the fact that Worrell was the leading man of the two; that he had a pistol in his possession capable of producing such a wound as was found on Gordon's head; that he loaded the pistol at Hutchinson's; that he was afterwards found in possession of Gordon's horse, watch, saddle, saddlebags, bridle and daguerrotype case, and that he told Mr. Sturgeon and Mr. Taylor that Gordon did not suffer after he was shot. These and other facts in the case leave no doubt as to who was the prime instigator of the act. But for the purposes of this prosecution it is wholly immaterial whether Worrell or Bruff inflicted the wound.

The first count in the indictment charges that Worrell did it, and that Bruff was present aiding and abetting. The second count charges that Bruff did it, and that Worrell was present aiding and abetting. That they were both engaged in the transaction is clearly shown by the testimony, and it is a well-settled principle of law "that if two or more

persons confederate and engage in a common design, the act of one is the act of all." If a blow is given, the blow of one is the blow of all. This law has been recognized by our Supreme Court on several occasions, and recently in the case of State v. Jennings, reported in 18 Mo. 435.

January 31.

Mr. Bay. At the adjournment of the court last evening, gentlemen of the jury, I had closed my remarks with respect to the first proposition contended for by the counsel for the defense. I will now call your attention to the second ground of defense, which is, "That if the evidence does establish the fact that the prisoner killed Gordon, it also shows that he did it in an attempt to commit a felony, and as he is not so charged in the indictment, he cannot be convicted of murder in the first degree."

The law upon which this indictment was framed will be found in the first section of article 2 of our statute relating to crimes and punishments and is as follows: Sec. 1. Every murder which shall be committed by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed murder in the first degree."

The counsel certainly did not pay us a very high compliment when he remarked in his opening speech, "that the State would contend that this was a murder committed in the perpetration of a felony." Such an idea never entered my head, and I am certain it was not contemplated by my colleagues, and if the counsel is really serious in his construction of the law, he is entitled to the credit of having discovered a rule of interpretation that has hitherto entirely escaped the observation of the courts of the country. The statute intended to place three classes of homicide in the first degree: 1st. Murder committed by means of poison or by lying in wait. 2nd. Every other kind of wilful, deliberate and premeditated killing. 3rd. Every murder which shall be committed in the perpetration or attempt to perpetrate

any arson, rape, robbery, burglary or other felony. In the first and second class express malice is essential, and forms a necessary ingredient in the offense, while in the third class it is not supposed to exist. If A breaks into the store of B at night with no other intent than to appropriate to himself the goods of B, and B enters and discovers him in the act, and attempts to do him bodily harm, and A to protect himself kills B, this is murder in the first degree because it is committed in an attempt to perpetrate a felony. Now this cannot be said to be a killing with deliberation, premeditation and malice aforethought, for the intent to kill was only formed when it became necessary to his personal safety, yet because it occurred while the party was attempting to perpetrate a felony, the law places it in the first degree, and makes it a capital offense.

In this case the theory of the State is that Worrell killed Gordon and then took and carried away the property, and not that he attempted first to take his property, and in the attempt a scuffle ensued which resulted in the death of Gordon. The fact that Worrell was afterwards found in the possession of the property is a fact introduced for the purpose of showing the intent with which the act was committed; the motive that led to it. It is an important link in the chain of evidence to establish malice.

The third ground taken by defendant's counsel is "That there is no evidence of express malice, which is essential to constitute murder in the first degree."

This point has been much labored by the learned counsel and the manner in which he has presented it evinces to my mind his entire want of confidence in the success of his defense, for I apprehend it would puzzle the ingenuity of the gentleman himself to imagine a case in which malice plays so prominent a part as it does in this. View it in any stage or aspect, and the eye must be dull indeed that cannot see the motive that prompted the crime; but as the counsel has made the point with apparent seriousness, I will meet it in a proper spirit.

Malice is a comprehensive word, susceptible of different

meanings, but in its legal sense, the only sense in which we are to consider it, signifies an evil design in general, a wicked and corrupt motive, an intention to do evil. Blackstone, in his Commentaries, says, "That it is the dictate of a wicked, depraved and malignant heart." Russell in his "Treatise on Crimes" (vol. 2, p. 482) says, "It is not to be understood merely in the sense of a principle of malevolence to particulars, but as meaning that the fact has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved and malignant spirit; a heart regardless of social duty and deliberately bent on mischief. And in general any formed design of doing mischief may be called malice; and therefore not such killing only as proceeds from premeditation, hatred or revenge against the person killed; but also in many other cases, such killing as is accompanied with circumstances that show the heart to be perversely wicked, is adjudged to be of malice prepense, and consequently murder." Wharton in his Law of Homicide says, "Malice in its legal sense denotes a wrongful act done intentionally or without just cause and excuse." Chief Justice Shaw of Massachusetts says, "Malice although in its popular sense means hatred, ill-will, or hostility to another, yet in its legal sense has a very different meaning and characterizes all acts done with an evil disposition and a wrong and unlawful motive or purpose, the wilful doing of an injurious act without lawful excuse."

It will thus be seen that law writers and jurists agree as to the meaning of the word malice, though they use different language to express the same idea. The definition by Wharton is brief and readily understood and signifies every intentional wrongful act for which no just cause or excuse can be given. Malice may be either express or implied; express, when the act is done with a sedate, deliberate mind and formed design. Deliberation and premeditation denote in themselves malice. Implied malice will be better understood by a few examples laid down in the books. Thus, if one kills an officer of justice in the execution of his duty, or any of his assistants endeavoring to conserve the peace, or any pri-

vate person endeavoring to suppress an affray or apprehend a felon, knowing his authority or the intention with which he interposes, the law will imply malice. So if one shoots at A and misses him and kills B, the law implies malice, though it is evident that he had no malice against B, and did not intend to do him any bodily harm. So, also, if one gives a woman with child a medicine to procure abortion, and it operates so violently as to kill the woman, the law implies that the killing was done with malice, notwithstanding there was no intent to take the life of the woman. These and similar cases were murder at common law, and the offenders punished capitally; but in this country we have modified the rigor of the common law, and this class of cases falls under the head of murder in the second degree or manslaughter.

Having thus defined the meaning of the word malice the next inquiry is, how is malice to be proved? In some few instances it is established by the previous threats or declarations of the party, but these are rare, for men who intend to commit crime seldom speak of it in advance. It therefore necessarily follows that we must look to the facts and circumstances of the case, and draw our conclusions from these facts and circumstances. The killing itself is a fact, as I have before stated, that may be proved by circumstances, and often more satisfactorily than by positive evidence. Malice is another fact to be proved in the same way—in other words, "every fact necessary to constitute murder in the first degree (except the death of the party) may be established by circumstances."

Archbold (vol. 2, p. 212) says: "When the prisoner's guilt is to be proved by circumstantial evidence only, the first evidence given should be the finding of the body, and the state of it, the next evidence the character of the wounds to prove the manner in which they were probably inflicted, as well as their being the cause of death; and then the facts and circumstances from which the jury are to imply that the prisoner committed the offense; and his motive for committing it." Mr. Greenleaf in his work on Evidence says "Malice may be shown from the circumstances attending the act." The

Supreme Court of Missouri have said the same thing in case of State v. Dunn, 18 Mo. 419, and State v. Jennings, 18 Mo. 435.

I will now, gentlemen of the jury, call your attention to the several facts and circumstances showing the malice requisite to bring this case under the head of murder in the first degree: 1st. The character of the wound. It is laid down in all the books that when the wound is inflicted with a deadly weapon or a weapon likely to produce death, and no just cause is given for it, the jury may and ought to infer that the party intended to do what he accomplished, for every sane man is presumed to act upon some motive and to intend the natural consequences of his act. If I draw a pistol and shoot one of you down, the fact that I intended to kill is a necessary conclusion from the act. If I throw a stick at one of you, the length of my little finger, and it enters the eye and inflammation takes place, and death results from the inflammation, it would be unreasonable to infer that I intended such a result; on the contrary the reverse would be the natural inference, for such a stick is not a weapon likely to produce death; but if I draw a bowie knife and plunge it in the breast of one of you, and death ensues, the natural conclusion would be that I intended to take life, and such intent constitutes express malice.

This rule of law applies directly to this case. The prisoner loaded a pistol at Hutchinson's the eve before the homicide. The body of Gordon was found with a gunshot wound in the back part of the head ranging towards the right eye, a wound such as a pistol of the character and size of the one seen in the possession of the prisoner would be likely to produce; a wound evidently made by a large-sized leaden ball. There is no evidence to show that he had just cause or provocation for the act, nor has his counsel given us any explanation of the transaction. You are therefore forced to the conclusion that he intended that death should result from the act; for death is the natural result of such a wound. The physicians who have testified in the case say such a wound would necessarily produce instantaneous death.

In the case of the State v. Bower, 5 Mo. 364, in which the defendant was convicted of murder in the first degree, malice was inferred from the character of the weapon and wound. The proof was in substance: That on the night preceding the homicide the prisoner and deceased stayed all night at the house of Mrs. Roussiere, two miles from the place where the murder occurred; that they appeared friendly while there; that they left her house together the next morning on foot, still appearing friendly. Prisoner carried a large stick in his hand; they were seen together about 200 yards from the place where the body was found; beyond this prisoner was seen alone wearing a cap afterwards identified as the cap deceased wore when he left Mrs. Roussiere's; the body of the deceased was found with several bruises on it, and the skull was smashed in as if done with a club and the hat and club of prisoner found close by it. There were other circumstances in the case, and some confessions, but nothing to show malice except what I have stated. Judge McGirk, in delivering the opinion of the Court, said: "If Bower did the act at all, the fact of the stick being carried three miles, and the evidence of bruises, and the skull being smashed in, proves wilfulness and premeditation, so that the case comes within the general description of those murders placed in the first degree. That the stick was used, the appearance of the body, the skull beat in, the breast and head bruised, abundantly prove this; that the killing with the stick was premeditated before the killing took place, is proved by the fact where the prisoner got the stick, how he carried it, etc."

The same principle was recognized by the Supreme Court in case of State v. Dunn, 18 Mo. 519. Dunn was an Irishman and deceased a German. They got into a discussion about the relative merits of Germany and Ireland, when Dunn took up the handle of a shovel and struck deceased with it, producing a wound which resulted in his death. There was no evidence of any difficulty between them prior to that time. Judge Scott in delivering the opinion of the Court said, "Whenever it appears from the whole evidence that the crime was at the moment deliberately or intentionally exe-

cuted, the killing is murder in the first degree; as if one without uttering a word should strike another on the head with an axe, this would be deemed premeditated violence within our act; it will constitute the offense, if circumstances of wilfulness and deliberation were proven, although they arose and were generated at the period of the transaction. If the party killing had time to think, and did intend to kill, for a moment as well as an hour or a day, it is a deliberate, wilful and premeditated killing, constituting murder in the first degree."

The principle of inferring intent from the nature and character of the weapon and wound runs through a long series of judicial inquiry, and is as well established as any other principle governing the administration of the criminal law. The State might with safety rest the proof of malice upon this fact alone, but there are other facts and circumstances bearing so directly upon this point that I cannot let them pass without notice. The concealing of the body also furnishes evidence of malice. Mr. Wright thinks but little importance can be attached to this, as an innocent person, through extreme fear, might do the same. I can well imagine a case in which it might occur. A very timid man might slay another in self-defense, when no other person was present to witness the transaction, and the fear of being charged with murder without his being able to prove the justification might induce him to conceal the body; but such a person would not appropriate the property of the deceased.

Worrell, moreover, had Bruff with him to prove the personal conflict, if any had taken place. Besides this he is a bold, daring, reckless adventurer, not having the fear of God or man to molest him. In his case, then, the circumstances attending the concealing of the body furnish abundant evidence of malice. He also rifled the pockets of Gordon and took and appropriated his horse, watch, saddle, bridle and saddlebags with their contents. This leaves no doubt as to the motive for the commission of the crime. About this time the company was collecting county and individual subscriptions for stock, and as Gordon was on his way to St. Louis,

where the office of the company is located, the prisoner might, and probably did, suppose that he had a large amount of money in his possession.

I might allude also to the fact of his assuming different names, and his flight of a thousand miles from the scene of the murder, and other circumstances developed in the case; but the entire case furnishes so many evidences of express malice that I am not doing your intelligence justice in supposing that you can entertain the slightest doubt upon this point. The idea that a man would shoot another in the back of the head, and then rob his person, and take and carry away his horse, watch, saddle, bridle and saddlebags, without any evil intent, is too absurd to merit further notice. I therefore hasten to the fourth and last proposition of the counsel, involving the issue of insanity.

This is the battle ground of the cause, the one upon which the gentleman has planted his heaviest battery; not the ground of his own selection, but one to which he has been driven by force of circumstances, and as it is his last stand, it was to be expected that he would here display his prowess. Unfortunately for the administration of public justice, this defense has, of late years, become too common, though it is only resorted to when every other avenue of escape is abandoned. It is the last resort, the straw at which the drowning man catches in his final struggle for life. Do not misunderstand me as intending to disparage this defense when a proper case is presented for its application; for God forbid that I should be instrumental in sending any man into eternity who is not strictly accountable for his acts; but I do say, and say boldly, that in this case there is no evidence upon which this defense can be predicated; that it is a trumped-up affair, taken up as a *dernier resort,* and planned and conceived for no other purpose than to evade the penalty of the law.

The first proposition of Major Wright is, "That the conduct of the prisoner from the time of his desertion at Fort Leavenworth, up to the day that he was lodged in the St. Louis jail, cannot be accounted for upon any other prin-

ciple than that of alienation of mind." I gave the gentleman's argument my closest attention, and so far from satisfying my mind of the truth of his proposition, he led me to the conclusion that the prisoner was a man of more decided intellect than I had attributed to him. The first act to which I shall call your attention relates to what transpired on the day of his desertion.

As first orderly-sergeant it was his duty, and his alone, to detail every day a man to assist in the stable, and one in the kitchen. The proof is that on that morning he detailed a man for the stable who owned a very fine bay horse, one of the fleetest in the stable. During the day he went to him and told him that he had made a mistake; that he had intended to place him in the kitchen and the other man in the stable, and directed the change accordingly. That night he deserted, taking with him the bay horse, which he could not have readily done had the owner remained in the stable.

I leave you, gentleman, to judge whether this fact indicated mental disorder. The prisoner crossed the river on the ice, and the next morning his cap was found at the edge of a large hole made in the ice for the purpose of watering horses belonging to the fort. This was done to elude pursuit by creating the belief that in attempting to water his horse, both he and the horse had fallen in and drowned. This ruse was eminently successful, for Dr. Worrell tells you that shortly afterwards he received a letter from Sergeant Clark, announcing the death of his son, and the officers at the fort did not learn to the contrary until they heard that he was arrested for the murder of Mr. Gordon. Dr. Worrell remained in the same belief until the arrival of his son in Dover. Here you have evidence of a mind capable of reasoning, of drawing conclusions from facts, and I question very much if either Major Wright or myself would have managed it half as adroitly.

We next find him at Ferguson's busily engaged endeavoring to sell a horse—succeeds in making the sale. Ferguson tells you that although he was conversing with him half an hour, he discovered nothing wrong in relation to his mind;

on the contrary, considered him quite shrewd in a trade. Hutchinson saw nothing unusual in his conduct; he appeared perfectly rational, and demeaned himself as travelers usually do.

Major Wright thinks (upon the supposition that he killed Gordon) that his conduct at the place of the homicide is wholly inexplicable; thinks a sane man would have concealed the body in the thicket. To my mind it is perfectly consistent with reason, and exhibits a degree of shrewdness, and a knowledge of human nature, which few men possess. It was necessary to conceal the body as soon as possible, and the gully afforded a ready means of doing it; whereas, it would have required some time to carry the body any distance into the thicket; besides, he could not leave it in the woods without depositing it on the surface of the ground, as the ground was frozen too hard to admit of digging a hole, even if he had had the implements for digging. In addition to this he very naturally supposed that if suspicion fixed upon that vicinity as the probable place of the murder, the persons in pursuit of the body would be most likely to search the thicket, and in this he was correct, for Major Walker tells you that he, Wentz and others were busily engaged searching the thicket, and but for the dog that scented the blood in the track of the road, it is not probable that the body would have been discovered until the snow had entirely disappeared from the ground. The gully was just wide and deep enough for the purpose, and so situated that persons following the usually traveled portions of the road would not be likely to notice it. It was snowing hard at the time, and their tracks were almost immediately obliterated. We have been asked why he left the saddle in the thicket half a mile from the road. The reason is obvious. He could not have put it on the horse he was leading without exciting suspicion, and by leaving it in the thicket it was calculated to draw attention from the road. Considering the time they had to operate, the whole thing was managed with considerable adroitness.

Major Wright has discovered evidence of insanity in the fact that on Saturday night he went to the theater in St.

Louis; and while in Vincennes to a ball. It occurs to me there is nothing remarkable in this. He knew that no suspicion of Gordon's fate would likely be entertained for some time to come, and moreover if his conscience upbraided him for the act, he might obtain a temporary relief by resorting to places of amusement. Dr. Webster, after the murder of Dr. Parkman, and while the city of Boston was in the highest state of excitement growing out of the supposed murder, attended a convivial party of ladies and gentlemen.

Shakespeare who understood human nature better than any other man, has truly described the mental torture that the murderer suffers—

> "But let
> The frame of things disjoint, both the world's supper
> Ere we will eat our meal in fear, and sleep.
> In the affliction of these terrible dreams,
> That shake us nightly; better be with the dead,
> Whom we, to gain our place, have sent to peace,
> Than on the torture of the mind to lie
> In restless ecstacy (agony)."

We are also asked why he remained four days in Vincennes. The answer is that no necessity existed for leaving sooner. The weather continued extremely cold, and he knew that the body remained concealed under the snow. He moreover thought that by assuming different names at different places he had rendered it impossible to trace him. In addition to this, he was out of funds, and had to sell his horses, and as they were very much jaded, it was important to give them rest to enable him to dispose of them to any advantage. He was detained one day longer than he designed, remaining by an accident on the road, which prevented the train from leaving at the usual time.

The fact that he made himself conspicuous, conversed freely, and in the cars after leaving Vincennes spoke to several ladies and gentlemen without an introduction, is also seized hold of as evidence of insanity. If the human intellect is to be measured by such a standard as this, there would not be, as was remarked by my colleague, a sufficient number of sane men in the world to take care of the insane. You would

convert the whole of New England into a lunatic asylum. I observe sitting on my left my old and much-esteemed friend, Major Robertson, with whom you are all well acquainted. How long do you suppose the Major could travel on a steamboat or in the cars without having something to say to at least three-fifths of the passengers. I am not certain, but it would seriously disturb the equilibrium of the Major's mind if he was not permitted to indulge in this social trait. Men in this particular are differently constituted; some are by nature extremely sociable, while others are reserved and difficult to approach. We are not here discussing the propriety or impropriety of speaking to a stranger without the formality of an introduction. That depends altogether upon our own notions of right and wrong, and upon the particular school in which we have been educated. It certainly would not bear the criticism of Lord Chesterfield; but in this Western country, where every man feels himself the peer of his fellow-man, Lord Chesterfield is no better authority than any other person. Each man establishes a code of etiquette for himself, and in this respect is his own lawmaker.

We are further asked why he did not sell the watch and dispose of the saddlebags; why he kept such evidences of guilt in his possession. It is a difficult matter to determine what is the best policy in such a case. Sometimes the very fact of selling stolen property leads to the detection of the thief. If the purchaser is an honest man, and discovers the property advertised, he delivers it up to the owner, and frequently becomes very active in procuring the arrest and punishment of the offender. In this case, the sale of the sorrel horse to Mr. Gould contributed no little to the discovery of the murderer. In either case there is a risk to run.

Major Wright is anxious to know why he did not leave Dover when he knew they were in pursuit of him. It is true that on his way from Smyrna to St. Louis, he told Couzins that he knew it, but there is no evidence of the fact given in the case; on the contrary, the evidence is that McGee did not go into the town until after the arrest, and did not see him until the train passed Smyrna, and the prisoner was not

acquainted with either Wentz or Couzins. Wentz, it is true, consulted with one or two lawyers in Dover, but there is nothing to show that they communicated the fact to Worrell, and we are not to presume that they were treacherous to their client.

The learned counsel thinks if the prisoner were sane, he would not have acknowledged to Wentz and Couzins that the watch and saddlebags had belonged to Gordon; nor would he have stated to Sturgeon and Taylor that the deceased did not suffer after he was shot. If a confession of this character proves insanity, then a murderer has nothing to do but acknowledge his guilt and receive his discharge. Confessions sometimes afford the only means of punishing the guilty and thousands have been executed upon them. The acknowledgment that the watch and saddlebags were Gordon's was only made after Wentz had stated in the hearing of the prisoner, "that he knew the watch to be Gordon's." It was the admission of a fact, after the proof of the fact. It is also possible, and even probable, that he designed charging the murder upon Bruff, for you will recollect that in speaking of the cloak left at Vincennes he said, "That cloak would tell the tale." Also when asked at Smyrna why he did not state who committed the deed, he replied, "I do not like to talk about it as the other man is a Mason."

I have now answered the first proposition of the counsel upon this issue, and I think you will concur with me in the opinion that the conduct of the prisoner furnishes no evidence of such a want of mental capacity as to render him irresponsible for his acts.

Men, after the commission of high crimes, often demean themselves in a way that does not comport strictly with our notions of wisdom. They are much inclined to think that all men look upon them with suspicion, and in their efforts to guard against discovery, say and do things that in the end lead to their detection. This was strikingly illustrated in the case of Dr. Webster, who had a week to dispose of the body of Dr. Parkman, and yet left the thorax of the deceased in a tea chest, and a full set of mineral teeth, which

had been made for the deceased by a dentist in Boston, in the furnace; both of which tended to identify the body and to connect the prisoner with the murder. Dr. Webster was a man of learning, a professor in a medical college, and his knowledge of chemistry placed it in his power to destroy in a few hours every vestige of the body, so that the *corpus delicti* never could have been established. Yet he neglected to do it. He also volunteered statements to the brother of the deceased and others, and addressed anonymous communications in a disguised hand to the marshal, in one of which he stated that Parkman was murdered on Brooklyn Heights; in another that he was taken forcibly on board of a ship; and in a third that the body had probably been cut up, placed in a bag and thrown over one of the bridges near Boston. In fact, nearly every step he took to draw suspicion from himself in the end furnished the prosecution with strong evidences of his guilt. There seems to be a fatality connected with murder, in which the hand of Providence is visible, and Solomon never uttered a greater truism than when he said: "The way of the transgressor is hard."

There is one fact alluded to by Major Wright which deserves a passing notice. Corporal Messick states that his company and Worrell's were stationed at the fort in the same building. One night while witness was acting as guard, prisoner came towards his post—witness hailed him by saying, "Who comes there?" Prisoner replied, "A friend." Witness commanded him to halt by saying, "Halt, friend." Prisoner advanced, gave the countersign, and said, "Good evening, sentinel." Witness let him pass.

This is thought by Major Wright to be a very hazardous undertaking for a sane man; but it is fully explained by both. Messick and Clark, who state that although the instruction to a sentinel is to fire upon any person who shall attempt without authority to pass, yet in time of peace it is scarcely ever done. Messick states that he has known others to approach a sentinel in the same way, and if the person is known to the sentinel, he is most always permitted to pass, though it be in violation of instructions. Messick knew that it was

tary of War for his discharge. Defendant seemed to be in trouble—witness told him that he thought it would be a hopeless undertaking, whereupon defendant said, "that there was no use talking, he wish'd to God he had never been born, and that if he could not get out of the army honorably, he would not desert, but he would get himself out for good."

Mr. Moore gives it as his opinion that the prisoner was laboring under strong mental derangement, and predicates the opinion upon the simple statement of the prisoner "that he wished he had never been born, and was determined to get out of the army;" an exclamation by a man in trouble. Mr. Moore is not a physician, and makes no pretentions to any knowledge of the diseases of the mind, and his opinion is consequently of no importance except so far as it is supported by the facts upon which he bases it.

In my opinion, the deposition of Mr. Moore furnishes more evidence of his insanity than of the prisoner, for what sane man would come to the conclusion that another man was insane because in a moment of trouble he expressed a regret at having been born. In a world of tribulations like this, in which the most favored of us are not exempt, most men in times of affliction or mental depression give utterance to similar exclamations. No doubt, Mr. Moore has done it himself, and if for this reason you should put a straight jacket upon him, he would declaim loudly against such an act of usurpation.

We have next the deposition of Frederick A. Cavendish, who deposes that on one occasion while prisoner was first orderly-sergeant, stationed at Fort Leavenworth, a man belonging to prisoner's company, and some Irish citizens were engaged in a dispute, and were making a very loud noise on the stairway leading to defendant's room. Defendant came out of his room much excited with a revolver in hand and said, "If you do not quit making such a damned noise I will blow hell out of you." Mr. Lane testifies to the same fact.

I see nothing unnatural in this, for it was the duty of the defendant as first orderly-sergeant to keep order about him, and in the army, where strict discipline is enforced and pro-

fanity not considered a crime, I should suppose such scenes were quite common. Any person discovering a quarrel at his door would be likely to resort to harsh means to quell the disturbance. Mr. Cavendish also refers to the sickness of the prisoner, deposed to by Clark as having occurred in December, 1855. Witness saw him in bed and says he seemed to him evidently out of his mind; was pulling hair out of his head; had been very unwell for two or three days. While confined to his bed two women entered his room, and during their visit he pointed to a particular spot on the wall, and calling our attention to it, remarked: "Do you see that picture on the wall? I drew that picture today; how do you like it?" Witness says there was no picture on the wall.

The learned counsel did not display his usual shrewdness in introducing this deposition, for it occurred to me while he was reading the picture scene that it was one of those hallucinations that never occur in homicidal mania, but is a marked characteristic of another disease called *mania a potu*, or delirium tremens, and this led me to inquire a little further into the matter when Lane and Sergeant Clark were on the stand, and I think their evidence shows that my conjecture was well founded. It is evident from all the testimony that defendant had but one attack of sickness from the time he returned from the plains in November, till his desertion in January, and the sickness referred to by Lane, Sergeant Clark and Cavendish must be one and the same. Lane, who was introduced by the defense, says he does not think it resulted from excessive drinking, but cannot say and would not swear it did not. He knows prisoner kept liquor in his room, for he drank with him several times. Sergeant Clark says he saw prisoner every day at the fort, and that he was always on duty except when sick—recollects that he had an attack of sickness between November, 1855, and January, 1856, after he returned from the plains. The afternoon preceding, witness saw him riding into the fort from the direction of the town of Leavenworth—noticed that he was very much intoxicated; so much so that he reeled from one side of his saddle to the other, and with much difficulty kept his

seat in the saddle. Witness also states that he had frequently drunk with prisoner in his room.

What then, I ask, can be inferred from all this, except the fact that his sickness and the delirium attending it grew out of excessive drinking, for there is nothing in the evidence for the defense that furnishes us any other explanation of it.

The deposition of George Urghart has been read and although a physician occupying the same room with defendant from February to July, 1855, yet he makes no allusion whatever to his mind, but simply speaks of him as being affectionate to his parents, particularly so to his mother. The next deposition is that of Dr. Wm. H. Curran of Kentucky, in which he refers to an attack which he supposed to be epilepsy, but I will refer more particularly to this deposition when I reach that branch of the case. We have next the deposition of Robert W. Raisin, who married a relative of defendant. This witness has known defendant 25 or 26 years, and states that he always considered him a wild and eccentric youth up to manhood. Upon one occasion witness was in his carriage passing over a bridge in Maryland—defendant was at the opposite end of the bridge, and as he saw witness coming, he raised the draw of the bridge, which placed witness in great danger—witness thought it was one of his common freaks of mind, very mysterious. The balance of Mr. Raisin's testimony is confined to the subject of hereditary insanity in prisoner's family, which will be the subject of comment when I come to notice that part of Mr. Wright's argument. The most that can be made out of Mr. Raisin's deposition is that prisoner was a wild and eccentric youth, such as we meet with daily in our intercourse with the world.

Mr. D. Blocher's deposition is next introduced. He knew defendant in 1848 and 1849 in Cumberland, Md.—thinks he had the head of a man but the mind of a boy. This witness gives no reason for his opinion, and in that request is a little more shrewd than Mr. H. Miles Moore. If he intends by that expression to imply that he was naturally wanting in good sense, he differs from every other witness who has given evidence in the case.

James Dunn in his deposition has volunteered an opinion as to the insanity of the defendant. He met him in Baltimore in February last, in the office of Mr. Raisin, and conversed with him on the subject of Kansas and Nebraska affairs. Defendant (in the language of witness) inflated himself with a considerable amount of gas and seemed much excited on the subject. If this is evidence of insanity, then the people of the United States have been unquestionably deranged ever since the passage of the Kansas-Nebraska bill.

From the testimony of Mr. Gould it appears that while in Vincennes he conversed very sensibly upon that subject; so much so that Mr. Gould remarked to a friend standing by "that he appeared to be a very sensible man, and capable of imparting much information upon the subject of Kansas."

The next and last deposition in the case is that of Samuel Ringold, uncle of the prisoner and brother of Mrs. Worrell. For what purpose the distinguished counsel introduced this deposition, I am wholly at a loss to conjecture; for even if he had established a pretext for this defense of insanity, the testimony of Samuel Ringold would blow it into a thousand fragments. Permit me, gentlemen, to read you one interrogatory propounded to the witness and the answer thereto: Question. If at any time since you have known him (defendant) he has evinced any manifestations of insanity, state the time, place and circumstances under which the manifestations were made, embracing what he said and what he did, and how he acted, and if this was on more than one occasion; state the times, places and circumstances. Answer. In the negative, except an occasional wildness and excitability. My God, what a farce are we engaged in, sitting day after day, seriously and laboriously inquiring whether the prisoner was sane or insane, when his own uncle, who has known him from the time he nestled upon his mother's breast and who is attached to him by the strong ties of our nature, and who would gladly sacrifice everything but his honor to shield him from the law, tells you, though reluctantly, that he has never discovered in him any manifestations of insanity. Gen-

tlemen, I am through with the depositions, though it will be necessary to call your attention to some parts of them upon other branches of the subject.

I wish now, gentlemen of the jury, to call your attention for a moment to that part of Major Wright's argument, in which he undertook to show that insanity was hereditary in the family of the prisoner. Upon an issue of this kind it is held competent to introduce evidence to show the existence of the malady with the parents of the accused, or that it has manifested itself through generations of lineal ancestors, but never, that I am aware of, among collateral kindred, and the fact that it has exhibited itself among lineal ancestors is only important when connected with other facts and circumstances tending to establish insanity in the prisoner. Mr. Taylor in his work on medical jurisprudence says "that when it is transmitted by hereditary descent, it often appears about the same age, under the same form, and is induced by the same existing cause in the offspring as in the parent."

In this case there is no evidence of its existence at any time with either the father or mother of the prisoner. It is true that Mr. Raisin and Mr. Ringold say that they once heard from rumor that Dr. Worrell had attempted to commit suicide, but they know nothing of the fact themselves and if the attempt had been made, there is no evidence that it had been induced by insanity.

On the maternal side the prisoner derives his blood from what is called the Kent Island branch of the Ringold family, a very numerous family scattered over a large portion of Maryland; and the only instance of supposed insanity in this branch of the family is that alluded to by Mr. Raisin, the case of Thomas Ringold. Mr. Raisin does not state whether he had personal knowledge of the fact, or whether he derived his information from rumor, but the latter is the most reasonable supposition, as he is contradicted by Samuel Ringold, who states unequivocally that no case of the kind ever occurred in the Kent Island branch of the family, and it is fair to suppose that he knows more about his own family than Mr. Raisin.

The next proposition submitted by the counsel—that the mind of the prisoner has been seriously impaired by epilepsy.

Epilepsy is a disease that assumes different grades. In its mild form it has never been known to produce any visible effect upon the mind, and yields readily to medical treatment; but in the aggravated stage results in imbecility, fatuity and sometimes in insanity; but never that species of insanity relied upon as a defense in this case. The symptoms in the aggravated form are so well marked that it is impossible to mistake it for any other disease. The attack is always sudden, and generally comes on without any premonition. The patient is heard to utter a loud cry and soon falls to the ground senseless and convulsed.

Dr. Watson, in his lectures on the Principles and Practice of Physic, states that in most cases one of the first effects of the spasm is the twisting of the neck; the chin is then raised and brought round by a succession of jerks towards one shoulder; the features are distorted; the eyebrows knit, and the eyes are fixed and staring; the mouth is twisted; the tongue thrust between the teeth and a foam issues from the mouth, sometimes presenting a bloody appearance; the hands are firmly clenched and the arms are thrown about, striking the chest of the patient with great force; the breathing is embarrassed and a choking sound is heard in the windpipe; the face becomes turgid and livid. When the paroxysm is over, the patient falls into a deep sleep, and upon waking is wholly unconscious of what transpired during the convulsion, and does not even know that he has had a fit. It is important, gentlemen, that you should bear in mind these symptoms as you scan the testimony given on this point.

Dr. Worrell states that on one occasion in 1845, while residing about a mile from Baltimore, his son, who was then 17 years of age, returned from the city, having been there during the whole day. The family at the time were seated at the supper table, and an aunt of the defendant went out on the porch, and soon returned much alarmed and stated that Edward was leading against a tree in the yard, and acted as if deranged; the doctor immediately went out and discov-

ered him in the condition stated by the aunt; he was raving and tearing and kicking up his heels, and looked wild and made strange gestures. They succeeded in getting him in the house, and some time after midnight he became pacified and fell into a sound sleep. The next morning he appeared as usual. The doctor does not pretend to say that it was an attack of epilepsy, but saw nothing of intoxication, and did not suspect anything of the kind.

A parent is apt to be blind to the faults of his children, but a disinterested person will find no difficulty in detecting drunkenness in the scene described, for his conduct was precisely such as a boy of his age who had been drinking too freely would exhibit.

He certainly gave no indications of epilepsy, for an epileptic falls suddenly to the ground, and is never found leaning against a tree or any other object for support; nor is the spasm generally prolonged over thirty minutes, and in most cases not exceeding ten or fifteen; and at the termination of the convulsion the patient goes into a sound sleep, but it seems the prisoner did not become quiet under seven or eight hours.

The next occurrence related by Dr. Worrell took place in Portsmouth, O., in 1850. His son had been out with some young men, who brought him home. The doctor did not see him until the paroxysm passed off, and thinks the attack was much lighter than the one near Baltimore. The evidence discloses nothing tending to show epilepsy.

The next attack took place in Kentucky in 1851, and is referred to by Dr. Curran in his deposition. Dr. Worrell and family were boarding at the time with the father of Dr. Curran. Dr. Curran gives it as his opinion that the attack was epilepsy, but fails to assign any reason for the opinion, and you are left in the dark as to who Dr. Curran is; what is the extent of his skill, and what experience, if any, he has had in such cases. The opinion may have been to some extent the result of information derived from Dr. Worrell, for Dr. Worrell states that he told Dr. Curran that his son was subject to convulsions. We are further informed by Dr.

Worrell that his son had another attack in the same year at Winchester, Ky. The doctor was stationed there temporarily as a teacher—his son slept with some young men of the town, one of whom called and told the doctor that his son was in a very bad way. The doctor only saw him as the spasm was passing off.

The next and last attack referred to by his father prior to the homicide occurred at the house of a Mrs. Elsay in Baltimore, where defendant was boarding in 1852. The doctor did not witness the attack, and states nothing in relation to it of his own knowledge except that he called in Dr. Dumbar.

From 1853 to the commission of the murder in 1856, a period of four years, we have no evidence whatever of a renewal of the attack.

Here then, gentlemen, you have, according to the evidence, but five instances of supposed convulsions prior to the homicide, and ranging from 1845 to 1852, inclusive, averaging less than one a year, and only one of those pronounced by a physician to be epilepsy, and, what is very remarkable, in no instance did any symptom of epilepsy manifest itself. The conclusion is then irresistible that these attacks were delirium tremens resulting from excessive dissipation, and that epilepsy was the pretext to conceal his habits from his parents.

Dr. Watson in the work already referred to (page 391) says:

"In the number of feigned diseases, epilepsy is one of the most common—soldiers and sailors pretend to have epileptic fits in the hope of obtaining their discharge from the service. Cases of simulated epilepsy also occur continually in our streets among mendicants and impostors, who think to excite the compassion and pecuniary charity of the credulous. It is easy enough, they think, to throw their legs and arms about, and to grin; and many of them get up a capital show of foaming at the mouth by placing a bit of soap between the gums and cheek." . . .

"Pretenders are not very willing to perform when they know that a medical man is looking on. They choose such situations for their exhibitions as are most suitable for their purpose."

"The epileptics are often seriously hurt by their falls; feigned ones generally come off without much bodily damage."

How admirably does the author's description of feigned epilepsy apply to the case of the prisoner at the bar. Has a single instance of personal injury been sustained in any of the attacks mentioned? Why is it that Dr. Bassett, who was physician to the jail, five months after defendant was confined there, and who saw him daily and attended him in a slight attack of intermittent fever, never discovered any symptoms of epilepsy? And yet as soon as Dr. Bassett ceased to attend the jail, he had one hundred fits in rapid succession, witnessed by no person but his mother. There is no evidence that the jailer, or any other person whose duty it is to take charge of the prisoner, ever saw him in one of these convulsions.

He served a considerable time in the army, and no person there ever saw him in one of them, and both Mr. Raisin and Mr. Ringold say in their depositions that they never heard of his having fits. Is it not then fair to infer that his is a case of simulated epilepsy, resorted to on some occasions to conceal his dissipated habits from his parents, and in the jail to furnish his mother with an apology for committing a high crime, and to lay a foundation for this defense?

But suppose for the sake of the argument we admit that the five instances referred to in the testimony were cases of real epilepsy, what conclusion is to be drawn from that fact. It is conceded by all writers on medical jurisprudence that the natural tendency of the disease is to produce imbecility and fatuity, and it requires many years with attacks at short intervals even to produce this result.

Dr. Bassett and Dr. Bannister, both of whom stand high in their profession, say "that to produce imbecility the complaint must be of long standing and the intervals between the attacks very short." Dr. Bannister for several years has been physician to the City Hospital of St. Louis, where lunatics are occasionally treated; he was also for one year an attending physician in the Philadelphia Hospital, where they had upon an average one hundred and eighty insane persons under treatment; yet, he never knew a case of insanity to result from epilepsy, though he informs you that it is stated in the books that it sometimes terminates in that way. He

has treated epilepsy very frequently, and states that a long attack with short intervals will result in loss of memory and the power to reason, and the mind will gradually sink into imbecility and idiocy—has known one instance in which the person had fits at intervals of one month, from early childhood to 25 years of age, without impairing the mind at all. He thinks it would require a duration of five years, with intervals of but a few days, to produce even imbecility.

How absurd then, gentlemen, to suppose that the prisoner, who was exempt from any attack for four years immediately preceding the homicide, and who, to give him the benefit of every supposition, reasonable and unreasonable, that the evidence furnishes, can only point to five attacks in a period of seven years, has sustained any mental injury. The world has furnished innumerable examples of men who, though epileptic, have become distinguished in science and the various departments of literature.

History records the fact that Cæsar and Napoleon Bonaparte were epileptic, yet one conquered the world, and the other by force of mind and military genius, brought the old world monarchies of Europe supplicating at his feet.

We have now, gentlemen of the jury, reached that part of the counsel's argument, at which he first gave us to understand what peculiar phase of insanity his client labored under at the time of the homicide. In his speech he sometimes called it homicidal mania, and at other times homicidal monomania, complicated with epilepsy. The latter, I presume, is what he really means, for no other species of insanity would be applicable to his theory of defense. To properly understand this condition of the mind, it is important to know how medical jurists have classified the different degrees of insanity. Taylor, Esquirol and others have treated it under four different forms: Mania, monomania, dementia and idiocy, and this classification has been universally adopted for its convenience and perspicuity. Ray, it is true, speaks of other kinds, such as intellectual and moral insanity, but his classification is too complicated to be of much practical use in the administration of the law. Mania, as defined by Taylor is that form of in-

sanity in which there is a general derangement of the mental faculties, accompanied by greater or less excitement, sometimes amounting to violent fury. It arises from a morbid affection of the brain, and is distinguished from ordinary delirium in this, that delirium is usually the result of bodily disease. In common parlance, a person laboring under mania is said to be mad; he loses all control over himself and requires close confinement to keep him from inflicting injury upon himself or others; in a word, he is entirely bereft of reason, and therefore irresponsible for any of his acts.

Monomania he defines to be that form of insanity, in which the mental alienation is partial. The patient is subject to delusions and is perfectly rational upon every subject not connected with his delusion—it may be accompanied with a propensity to homicide, larceny, arson or any other offense, and is often connected with the subject of religion. A man imagines that he is clothed with spiritual power and is commissioned by the Almighty to go into the world and proclaim certain doctrines, and upon the fulfillment of his mission depends the safety of all mankind; he is said to be laboring under a delusion; and when the subject of religion is mentioned in his presence becomes wild and destitute of reason; yet upon all other subjects is perfectly sane; capable of attending to business, and moves in society without exciting any suspicion of his mental disorder. If he commits a crime, he is responsible for it unless it is connected with the particular delusion. It may be accompanied with a propensity to murder, as when a man imagines that the world has conspired to take his life, and every man he meets is seeking an opportunity to accomplish it, and that his only safety is to kill all who approach him; he is said to be laboring under a delusion and therefore not criminally responsible for a homicide committed while under the delusion. But if he had committed larceny there could be no question as to his responsibility; as no connection could exist between the crime and the delusion. A leading case in point is reported as having occurred in England (5 Carrington & Payne, 168), in which a man by the name Oxford was indicted for the mur-

der of one Chisuall. It appeared in evidence that the prisoner labored under a notion that the inhabitants of the town of Hadleigh, of whom Chisuall was one, were continually issuing warrants against him with intent to deprive him of his liberty and life; that he would frequently under the same notion abuse persons whom he met in the street and with whom he never had any dealings or acquaintance of any kind. In his waistcoat pocket a paper was found, headed "list of Hadleigh conspirators against my life." It contained forty or fifty names, and among them "Chisuall and his family." There was also found among his papers an old summons about a rate, at the foot of which he had written, "This is the beginning of an attempt against my life."

The medical witnesses in the case testified that from the evidence given, the prisoner, in their opinion, labored under that species of insanity which is called monomania; and that he committed the act while under the influence of that disorder, and might not be aware that in firing the gun his act involved the crime of murder.

Ray gives another case, which occurred in 1843—a Scotchman named McNaughton met in one of the streets of London Mr. Drummond, the private secretary of Sir Robert Peel, and shot him dead with a pistol. For some time previous he had entertained a delusion that he was pursued by enemies that followed him everywhere, blasting his fame, disturbing his peace and filling him with intolerable inquietude; and fancying his victim to be one of the crew, he determine to sacrifice him. His insanity was not obvious at sight; he had recently transacted business and behaved with propriety in the ordinary intercourse with men. Was it not for the unnecessary consumption of time I would refer you to other cases in which this character of delusion has manifested itself; but I pass on to the next form of insanity as given by Taylor and known as dementia. He places under this head those cases in which there is a total absence of all reasoning power caused by the destruction, and not the perversion of the mental faculties. There is a want of memory as well as a want of consciousness on the part of the individual of what

he does or says. Prolonged disease and extreme old age contribute largely to this species of insanity. Ray says, "The mind passes gradually from its sound and natural condition to the enfeeblement and total extinction of its reflective powers." When we see a person greatly advanced in life, who has lost his recollections of persons, things, dates and events, and who in his tone, conversation and habits plays the part of a second childhood, we say he labors under dementia. Idiocy is characterized by the want of mental power, being congenital. The person comes into the world without intellect and goes out of it in the same condition. He is called a natural fool, incapable of reasoning at all.

But we must return to the subject of monomania, for it is under the head of homicidal monomania that the defense in this case necessarily comes. Homicidal monomania is defined to be a state of partial insanity, accompanied by an irresistible impulse to commit murder. It differs from mania and other forms of insanity in this, that there is no appearance of disorder of either mind or body. It cannot be traced to any physical cause and hence the labor of the learned counsel to establish the existence of epilepsy in his client was an entire waste of ammunition. The desire to kill is sudden and the impulse irresistible. Nearly all authors on medical jurisprudence lay down certain tests by which the existence of the disorder is to be ascertained, and I propose now to apply these tests to the case of the prisoner, as the best method of determining whether he killed Gordon by means of this irresistible impulse.

The first test of a homicidal monomaniac is "that he never has accomplices." This, I believe, is almost universally conceded, and I know of no case in the books which furnishes an exception to the rule.

How stands the case with the prisoner at the bar? He had an accomplice in Bruff, who deserted with him from the fort, was present aiding and abetting in the murder and fled with him to Vincennes.

Another test is this: "A sane man always acts from real motives, while the insane man or monomaniac is without a

motive, or if he assigns a motive, it is connected with his delusion."

Numerous instances are given in which parents have murdered their children, notwithstanding they were strongly attached to them. Nurses have destroyed children placed in their charge, and between whom a warm attachment had grown up. Taylor relates the case of a man named Greensmith, who murdered four of his children and the motive assigned was that he was apprehensive they would be turned into the street. He was a man of industrious habits and an affectionate father. The impulse came upon him at the time of the perpetration of the crime. He shook hands with his children before strangling them and bid them an affectionate farewell. Men living upon the most amicable terms with their families have been known suddenly to be seized with the delusion that their children were conspiring to destroy them, and while under the delusion, have made wills, giving the property to strangers. The fact that a monomaniac acts without an adequate motive is well recognized.

How stands it with the prisoner? Does any one doubt that he committed the crime charged against him, for the purpose of appropriating to himself the money and the property that Gordon had about him?

Another test is found in the fact "that a monomaniac thinks his acts are consistent with reason and the general conduct of mankind, and as a natural consequence of this, he makes no attempt to conceal the crime or make his escape, but openly confesses it."

He cannot be convinced that he has done wrong, and in this respect his conduct differs from mere eccentricity, which is often confounded with insanity, for an eccentric man will be readily persuaded into the impropriety of his conduct.

The prisoner in this case not only attempted to conceal the crime but fled to Dover, where he no doubt supposed he was secure from detection. There certainly is no evidence that he entertained the idea that he did right in killing Gordor

A further test is "the loss of affection for parents, wife, children and friends." Ray, Taylor and other writers com-

ment upon this at considerable length, and give a variety of instances from which it appears that in nineteen cases out of twenty the victim of the monomaniac is some person nearly related to him. The father destroys the son, the son the father. the mother her suckling babe, the brother the sister, and the sister the brother.

The delusion is most apt to be connected with those who are in daily intercourse with them. The case of Greensmith just referred to is a striking example of the kind. Taylor cites other cases: the case of Nicholas Steinberg, who cut the throats of his wife and four children in 1834; the case of Lucas, who destroyed his three children in 1842; and the case of Giles, who cut the throats of his two infant children and then committed suicide.

In all these cases there were no previous symptoms of insanity, nor any irregularity of conduct exhibited by the homicides. In the case at bar, the proof is that the prisoner is much attached to his parents and friends, and for his mother has always manifested an ardent attachment No instance of attempted violence to any relative, friend or acquaintance has been given in evidence.

Sleeplessness is spoken of by Ray as another test, though not always to be relied on. He says, "in real mania the patient will be days and even a week without sleep; while the simulator if aware of this feature of the disease, will be observed, when faithfully watched, not to protract his sleeplessness to anything like the period which it commonly attains in the real disease."

I am not aware that the defendant's counsel has furnished any evidence tending to show that the prisoner has not enjoyed the privilege of his accustomed rest.

Ray says, "nothing irritates a monomaniac more than to be called insane. He stoutly repels the idea and maintains the reality and correctness of his delusion." The prisoner here seems to be extremely thankful for any evidence tending to establish his insanity, and in fact has made two affidavits for continuance at different terms of this court, upon the

ground of absent witnesses by whom he expected to prove that he was insane.

I shall not contend that all of these tests are infallible, for doubtless some of them do occasionally fail, but as a guide in an inquiry of this kind they are invaluable; and when it can be shown as in the case here, that the prisoner's conduct does not square with either of them, it is certainly very safe to conclude that he is not a fit subject for this defense.

The subject of insanity in its various forms and stages is exceedingly difficult to comprehend, and hence the courts both in England and in this country, acting upon the suggestion of medical jurists have laid down a rule for the guidance of jurors in such cases, which has become of great practical utility and relieves them of much embarrassment. The rule brings down the inquiry to the single question of capacity to distinguish between right and wrong, at the time when the act was done. In the case of the State v. Baldwin (12 Mo. 223) the Court charged the jury: That if they found from the evidence that the defendant committed the act charged, the question then for them to determine was whether, at the time, he was capable of knowing that the act which he was committing was an offense against the laws of God and man, and had at that time the power of choosing between good and evil in reference to that act." In reviewing this charge the Supreme Court say that they can perceive no legal objection to it.

In the case of Rex v. Oxford, which has already been quoted, Lord Denman said in his charge to the jury:

"The question is, whether the prisoner was laboring under that species of insanity which will satisfy you that he was quite unaware of the nature, character and consequences of the act he was committing; or, in other words, whether he was under the influence of a diseased mind, and was really unconscious, at the time he was committing the act, that it was a crime; the insanity must be such as to deprive the party charged with crime of the use of reason in regard to the act done. He may be deranged on other subjects, but if capable of distinguishing between right and wrong in the particular act done by him, he is justly liable to be punished as a criminal."

The opinion of Lord Denman is cited in 1 Archbold's Crim. Prac., 12, 10, 11, and is recognized as the law by our Supreme Court in the case of the State v. Hutting, 21 Mo. Rep. 464. The question of incapacity to determine between right and wrong, and to choose between good and evil, is a fact to be established affirmatively by the defendant, and it must be so established as to leave no doubt upon the minds of the jury; for the mere fact that the defendant might possibly be insane is no ground for acquittal.

This, gentlemen, is a safe rule, and one which will afford you much assistance when you come to deliberate upon your verdict. Can any man suppose, who has heard the evidence in this case, that at the time of the commission of the murder the prisoner had not sufficient mind to distinguish between right and wrong; did not know that he was violating the law of God and man; or can any person suppose that he was acting under an influence which he was incapable of resisting? Does not his whole life, particularly that portion spent in the army, give such an idea a positive contradiction?

Lieut. Robinson was stationed with defendant at Fort Leavenworth in 1854, and during that year crossed the plains with him as far as Fort Union, New Mexico; yet he never saw anything like elilepsy or unsoundness of mind about him. He further states that the office of orderly-sergeant is the most important in the company, its duties being very arduous, and that no man can fill the place whose mind is in the slightest degree impaired. Yet the prisoner discharged the duties well, and was considered the best orderly at the fort. It is furthermore a regulation in the army to receive no man who labors under mental or bodily disease. These are facts worthy of serious consideration. Notwithstanding he was in the army for a considerable length of time, continually with arms about him and in daily intercourse with men armed like himself; yet no instance is given in which he was seized with this sudden impulse to take the life of his fellow-man, and is it not remarkable that this impulse should take possession of him at the particular spot where Gordon was killed; and is it not strange that this impulse should drive

him to search the pockets of the deceased, appropriate their contents, conceal the body, and take and carry away his horse, saddle, saddlebags and watch? Was it under this irresistible impulse, that he changed his name, sold Gordon's horse to Gould and fled to Dover?

Why is it that we are left in the dark when the gentleman had it in his power to explain this extraordinary phenomenon of the human mind?

It is now, gentlemen of the jury, two weeks since you were impanelled, and as this, the last day of the week, is fast drawing to a close, you no doubt feel anxious to return to your homes and families; I shall therefore detain you but a few moments longer. The facts developed in this case show one of the most cruel and bloody murders ever committed on the highway. Indeed, the annals of crime scarcely furnish a parallel to it; and now it remains for you to say what shall be done with the murderer. You must convict him of murder in the first degree or discharge him, for his case contains none of the elements of a lesser offense. It may be painful to consign a fellow-man to death, but the duty is enjoined upon you by both human and divine law. "Moreover, ye shall take no satisfaction for the life of a murderer who is guilty of death, but he shall surely be put to death; for the land cannot be cleansed of the blood that is shed therein but by the blood of him that shed it."

It is a lamentable fact that of late years crime has increased in our country with fearful rapidity. You cannot take up a newspaper without being startled at the recital of some bloody deed. In our large cities no man is secure who walks the street after the setting of the sun; and if it is known that he has money about his person he is shot down or dirked with as little ceremony as a butcher slaughters his beef for market. This is no doubt to some extent owing to our greatly increased population and partly to the luxurious habits of the age, but a more potent cause than either grows out of our remissness in executing the laws. Jurors lose sight of the fact that the chief object in punishing an offender is to deter others from committing a like offense; they seem to

suppose that the culprit is alone interested; and upon bare conjectures or a mistaken sympathy turn him loose upon society encouraged to plunge still deeper in crime and iniquity. This disinclination to enforce obedience to the law is said to be the bane of republics, and no doubt contributed in a great degree to the downfall of the Roman Empire. Rome was once the mistress of the world, but no sooner did licentiousness and disorder gain the supremacy than she sunk into an insignificant dependency. Our republic is yet in its infancy, and although we have done more to extend the area of human freedom than the most sanguine votaries of liberty could have hoped for, yet we are far from being able to calculate with any certainty upon the future, and he who flatters himself that our ship of State is never to encounter an angry sea greatly underrates the depravity of the human heart. An unrestrained liberty is as great a curse as a despotism, and the true secret of political economy is to steer between the two extremes. If we wish to avoid the fate of other republics, we must temper our liberty with proper restraint. We must enact wise and humane laws and permit no man to violate them with impunity. A settled conviction in the public mind that the laws will be strictly enforced without regard to person or condition is alone essential to check the onward course of crime. Unfortunately so many avenues of escape are offered to the offender that he has ceased to regard the law as an obstacle in his way; he counts the chances and finds the percentage largely in his favor. For every fifty murders committed in this country there are not exceeding three or four executions. This is not the fault of the law, but of those who are called upon to execute the law. Under our form of government there is no tribunal whose duty is so responsible and upon the faithful discharge of which so much depends as a jury; for except by your edict no man can be brought to punishment for a violated law. I conjure you then to meet this responsibility so far as this case is concerned with a full determination to do justice to the State as well as the accused, and if you are satisfied beyond a reasonable doubt that he committed the crime as charged in the indict-

ment, say so, and let him abide the consequences. It was a voluntary act on his part, and he committed it with a full knowledge that he thereby justly forfeited his life. Should you find him guilty of the charge, how different even then will be his fate from that of his victim! The law, in its mercy will give him ample time to atone for his crime, to make peace with an offended God, and to receive the parting benediction of his family. But poor Gordon was sent into eternity without warning; without even time to say, "God be merciful to me a sinner!"

The learned counsel has invoked your sympathy in behalf of the prisoner's parents, particularly the mother, who has been a daily attendant upon this trial. The appeal was unnecessary, for I presume no one within the hearing of my voice is so destitute of the kinder feelings of our nature as not to commiserate their condition. I know well the tie that binds a mother to her child, and if sympathy can lighten the burden that presses upon her heart, most cordially will we unite with the counsel in extending it. But he should not have exhausted his sympathy here; he should have saved at least a portion of it for another whose heart has also been made desolate by this foul murder. Poor Gordon had a mother. She still lives, wrecked in body and mind. Left a poor widow when the deceased, her only son, was in his tender years, she struggled hard to give him the benefit of a liberal education, and finally succeeded, although it left her, in her old age, reclining upon him for support. Nobly did he respond to the call; for from the time he reached manhood till his death, he never failed to divide with her the product of his toil. He was a son worthy of such a mother, kind, affable and affectionate, and free from those vices which so often lead astray the youths of our country. By this cruel murder this mother is thrown upon the charity of a cold and heartless world, and at a time of life when illy prepared to encounter its frowns. May God in his mercy throw around her his protecting arm. Could you see her as others have seen her, bowed down by a grief too deep for tears to quench,

you would experience no difficulty in finding a suitable object for the exercise of your sympathy.

Gentlemen, I have done; may the Almighty so direct your minds that in the verdict you shall render, no cause shall be found for future regret.

THE CHARGE TO THE JURY.

JUDGE STONE. The jury are instructed by the Court that if they find that the prisoner killed Mr. Gordon as charged, then their next duty will be to inquire and determine, first, whether such killing be murder, and if murder, whether in the first or second degree; or, second, whether it be not excusable in consequence of the mental insanity of the prisoner, in a degree which exempts him from any accountability. To establish the guilt of murder in the first degree, the law requires evidence of a character which, of itself, and by fair and natural inference, proves the killing to have been a wilful, deliberate and premeditated act, as contradistinguished from one done in the heat of passion and without intention. In other words, that at and before the time of inflicting the mortal wound the prisoner intended to kill Mr. Gordon, and that such killing was the deliberate and premeditated act of a mind capable at the moment of reasoning and deliberating on the reasons and motives influencing to its commission, when free from the perverting influences of insane delusions, or the controlling impulses of sudden and violent passion.

In murder in the first degree the facts and circumstances which indicate deliberation, malice and premeditation are required to be proved affirmatively by evidence in the cause. Such evidence as by fair and natural inference alone and without a resort to presumptions of law or artificial rules of legal reasoning, establish the facts required to be proved; and although deliberation, malice and premeditation may be, and often is, a conclusion of law from a given state of facts, yet, until the facts from which the law deduces the existence of such deliberate malice are first established by competent affirmative evidence, no inference can be drawn from the fact

of killing alone, to establish the guilt of murder in the first degree. Some of the facts and circumstances from which the law deduces the inference of malice and premeditation consist in the proof of the previous threats, former grudges, a lying-in-wait for, and seeking occasion to do some personal injury. The statute mentions these as some of the more obvious and prominent indications of deliberate malice, but there are others equally efficient, such as killing to accomplish some unlawful purpose, as to rob the person killed; a killing from mere wantonness and disregard of human life; a killing without motive and without passion; or if, in passion, without an adequate provocation to excite it to that degree, or where the circumstances attending the killing exhibit a depravity and malevolence of heart, a disregard of all social duty and a fatal propensity to crime and mischief. Such a state of facts are the clear and unerring indications of a condition of mind and heart which the law denominates deliberate malice and premeditation, and when proved establish the guilt of murder in the first degree. Every intentional killing of a human being which, from the facts and circumstances established, and actually shown to exist by evidence disclosing them, we cannot rationally ascribe to misfortune, necessity or to the strong impulses of sudden and violent passion, is a wilful, deliberate and premeditated killing in the meaning of the statute and is therefore murder in the first degree. No definite length of time is required for deliberation before the giving the mortal stroke to characterize the act as a deliberate and premeditated killing.

If the slayer was for a single moment of time before striking the mortal blow in a condition of mind capable of thought and deliberation, when free from the control of sudden and violent passion, and did thus deliberately determine to do the deed, it is sufficient.

But the jury should remember that passion alone, without proof of an adequate provocation to excite it, is not sufficient to rebut the inference of deliberate malice and premeditation, or to extenuate the act from murder in the first degree to some less offense. Indeed, passion without provocation is

rather an evidence of such deliberate malice. To allow to passion any extenuating quality, the proof must disclose the existence of an adequate exciting cause. The clemency of the law is not extended in favor of a class of mankind, whose minds and hearts, from habit and indulgence, prove the darker passions are apt to become too easily and dangerously excited upon slight provocation, and to resent slight affronts with disproportionate violence. The provocation which extenuates an act of homicide in consequence of the passion it excites must be of a character and degree which in a heart not naturally wicked and depraved would be reasonably calculated to produce the result. Mere words, however reproachful and insulting, are not a sufficient provocation to lessen the grade of crime of an act of homicide.

Any act of killing a human being, therefore, which from the facts and circumstances disclosed and affirmatively established by evidence in the cause, we cannot reasonably and fairly refer to the controlling impulses of sudden and violent passion, upon adequate provocation, and where in addition it is made to appear by the evidence that the killing was the result of design and intention of the person inflicting the mortal wound, is a wilful, deliberate and premeditated killing in the meaning of the statute, and is murder in the first degree.

On the other hand, unless the circumstances indicating deliberate malice and premeditation are affirmatively proved by the evidence in the cause, to have existed in the particular case we are examining, then the law presumes the killing to be murder in the second degree only. Murder in the first degree is distinguishable from murder in the second degree in this, and although each requires the same characteristic quality of deliberate malice, and although there is supposed the absence of proof of sudden and violent passion alike in each degree, yet in murder in the first degree the law requires that the facts and circumstances indicating deliberate malice and premeditation shall be shown and established as affirmative facts, deducible from evidence in the cause alone, and to be found by the jury. Whereas, in murder in the second de-

gree, they are deduced as an implication of law, in the absence of such affirmative evidence (the killing being only proved) and to be declared by the Court. Mere presumptions of law arising from the absence of extenuating evidence, and where the circumstances attending the killing are not fully disclosed, are not allowed to supply the affirmative proof of the facts and circumstances indicating deliberate malice and premeditation required in murder in the first degree. The jury must be able to find as an affirmative fact, and from the evidence alone, that the killing of Mr. Gordon at that moment of time was deliberately and intentionally done by the prisoner before they can find him guilty of murder in the first degree. And if from all the evidence in the cause, and from the evidence alone, the jury cannot, in the exercise of their natural reason, find as an affirmative fact, that the prisoner did intentionally, deliberately and premeditatedly kill Mr. Gordon, as charged, then, in the absence of evidence of extenuation, such as violent passion upon sudden and sufficient provocation, the law adjudges such killing to be murder in the second degree only.

But as there is evidence in the cause conducing to show that more than one person may have been present at the supposed killing of Mr. Gordon, and the jury, in consequence of a possible doubt as to which of the parties may have inflicted the mortal wound, may be embarrassed, being ignorant of the law in such case, they are further advised and instructed, that where there is a common purpose to commit a criminal act, participated and concurred in by two or more persons, and one of them actually commits the act, the others being present, aiding and abetting him in its accomplishment, the law adjudges the act of the one who puts hands to and actually does the deed, to be equally the act of each and all so present, aiding and abetting in its perpetration. All are responsible for the acts of each, done in pursuance of and in furtherance of the common design, and are held to be equally the guilty instrument of its perpetration. Nor, indeed, is it necessary that they should be actually present at the commission of the principal act, if sufficiently near by to render

assistance, if indeed, to watch to prevent surprise, and by the knowledge of that fact, encourage and inspire the active agent with confidence and resolution to do the deed. It is not alone sufficient to render such persons liable, that they were present at the doing of a criminal act, the evidence must go farther, and show that they participated in the guilty purposes of the principal perpetrator of the deed, and were present aiding and abetting in its accomplishment. If, therefore, the jury find that the prisoner actually shot Mr. Gordon, or that William Bruff did it, himself having knowledge of his purpose, and being present aiding and abetting him in the deed, then they will find him guilty of murder in the first or second degree, as the evidence in the cause shall show the killing to belong to the one class or the other, according to the law above explained.

And if upon the whole evidence in the cause, the jury shall entertain a reasonable doubt of the guilt of the prisoner, they will acquit him; but the doubt which acquits must be such as the mind rationally entertains after an examination and consideration of the evidence; it must arise out of the evidence, and is not that species of doubt or hesitation of mind which the jury may be disposed to indulge from mere idle fancy or vague conjecture.

But the jury should not lose sight of another important and essential element of all crime, which in this case is brought prominently into view by the line of defense adopted. In every stage of this cause the inquiry arises, whether at the time of committing the act charged against him, the prisoner was in a condition of mind rightly to comprehend its nature and moral quality, or, on the contrary was he laboring under such a defect of reasoning arising from the mental disorder as to have no just sense of its enormity? Was he laboring under insane delusions of the existence of a state of facts and circumstances which in consequence deprived his act of any guilty consciousness, or whether rightly comprehending the guilty quality of the act, his mind and will, from the overwhelming violence of its disease, was brought under the control and dominion of insane impulses to such

a degree as to deprive him of all capacity of resistance. The law widely distinguishes between the guilt of an act which is the result of criminal design, and one committed under the pressure of mental disorder and of its insane impulses. The one is regarded as a crime deserving of punishment, the other as a misfortune deserving of compassion; the one is regarded as the act of a free agent capable of reason and influenced by motives, the other as of a victim of disease and a slave of delusion.

In order to impart any guilty or criminal quality to an act done in violation of the law, it must appear that the person who commits it had at the time mind and intelligence sufficient to deliberate on its necessity and propriety, and to form criminal purposes. Such persons, and such only, are adjudged capable of crime and responsible for their acts. It were a perversion of law and incompatible with the dignity of public justice to inflict punishment on that unfortunate class of mankind, whose minds from disease have become so depraved and perverted as that they have no will, no conscience, no controlling power over their actions, and have become the unresisting slaves of false impressions and insane delusions.

The diseases of the mind are of so mysterious a nature, and manifest themselves in so many forms, and in such various degrees of intensity, that, were I otherwise able, it were impossible, in a charge to the jury, to attempt even any general account of them. The evidence relied on to prove, and to disprove its existence in the present case, is before the jury and demands at your hands the most careful and watchful examination. Confining myself within the limits of my legitimate duties, all that I propose to do to aid you in your inquiries is to present to your view the general principles of the law which excuses an act of homicide on the score of insanity, and exempts the unhappy agent who commits it, from any accountability.

1st. If the prisoner, at the time of committing the act charged against him, is found by the jury to have been laboring under such a defect of reason, from mental disorder, as

not to know the nature and quality of the act, or, if knowing it, was unconscious that it was wrong, then the law adjudges him to be an improper subject of punishment, and acquits him of any accountability. But the jury should be careful not to confound a depravation of the moral sense arising from mental disorder with that which results from a lack of proper culture, or from the long and habitual indulgence of the baser propensities and passions. The principle which exempts from responsibility extends only to that class in whom the depravation of the moral sense is traceable to mental disorder alone.

2d Class. Cases of partial insanity may and do exist, in which the person affected, although otherwise capable of reason and judgment, yet labors under insane delusions as to the existence of facts and circumstances, which, had they in reality existed, would seem to justify any degree of violence proportionate to their nature and character, and to relieve the person of any guilty consciousness in consequence of such act. As where, under the influence of his delusion, he erroneously supposes another to be in the act of attempting to take his life, and he kills him to prevent it; or where he insanely believes himself to have sustained, or be about to sustain, some other grievous injury in his person, or otherwise, and that taking the life of his supposed wrongdoer is in law and morals the proper and legitimate remedy to redress the wrong. Or where there is any other insane delusion which prevents the party from perceiving the guilty quality of the act done by him under its influence. In all these and like cases the principle of irresponsibility applies. But the jury should again bear in mind that in all the cases referred to in the second class, in which the law exempts a person from accountability for an act under its influence, it must appear that the insane delusion is of a character which naturally excites to the committing of the particular act done, or acts of the same or similar class. If the act done is a homicide, the insane delusion which excuses it must be of a nature and character the usual and natural tendency of which is is to steal or break out into acts of violence and of blood. If the

insane delusion is of a character the tendency of which is to steal it will not excuse a homicide. The act is to be judged always by the nature of the delusion, and of the facts and circumstances insanely believed to exist, and which for this purpose are to be taken by the jury in reality to exist, and the moral and legal status of the act determined accordingly.

3d Class. Another class of cases of insanity which exempts its unfortunate victim from legal accountability is where, in consequence of mental disorder, the person labors under delusions, the necessary tendency of which is to break out into acts of violence and of blood, without the power of self-restraint, and where although clearly perceiving the moral enormity of the act, he is incapable of resisting the insane impulse which urges him on to its commission; in short, where the act is the necessary result of uncontrollable monomaniac impulse, and not that of a free agent, who is the subject of moral influence and governed by will. To establish this species of insanity as a justification in the case before you, clear proof, or such as will satisfy your minds with a reasonable certainty of its existence and presence at the time of the killing of Mr. Gordon should be produced, or at least the existence of a tendency exhibited on previous occasions, becoming habitual and confirmed; and where, in addition, the facts and circumstances attending the killing are consistent with the hypothesis and confirms its existence and presence at the time.

But the jury are admonished that the law presumes every man sane, and to possess a sufficient degree of reason and freedom of will to be accountable for his acts, until the contrary is established with reasonable certainty. But, on the other hand, if the jury should find the fact of insanity in any of its various forms and degrees above spoken of is established by the evidence in the cause, with reasonable certainty, then every consideration of reason, of law, of humanity and pity for the unfortunate appeals to your sense of justice and of right in behalf of the prisoner, and demands his acquittal at your hands.

THE VERDICT AND SENTENCE.

The *jury* retired to consider their verdict. They were out about an hour, and when they returned the *foreman* pronounced the words: "We, the jury, find the prisoner guilty of murder in the first degree, in manner and form as charged in the indictment."

The *prisoner* was required to stand up and receive his sentence. He arose, his father and mother on each side of him, their arms around his neck.

JUDGE STONE. Mr. Worrell, you have appeared before me for the last time. It is a most painful duty that I must now perform, which is to pronounce upon you the sentence of the extreme penalty of the law. It is painful to see so young a man and one so respectably connected who, by his conduct, could have raised himself to happiness and promoted that of his family, but whose hopes in that respect have been dashed to pieces and blasted by crime of the foulest die. Yours might have been a path of distinction, but you have not chosen that course. Let me advise you that all human hope for you is ended. But while justice must take its course, and while you have but a few days to make preparation for eternity, I tell you there is a consolation from heaven—there is a balm in Gilead. Make your peace with Him whose blood washed out all sins. There is your only hope. Though your sin be as scarlet, His mediation can make it white as snow. Look to the Savior as your only remaining hope.

I must now pronounce upon you the sentence of the law, which is that you be taken hence to the place where you came, and that on the 17th day of March, next, between the hours of 10 a. m. and 2 p. m., the sheriff of this county conduct you to some convenient spot, and there and then hang you by the neck until you are dead—and may the God of heaven have mercy on your soul!

The *prisoner's counsel* appealed to the Supreme Court, which affirmed the verdict and sentence. See Missouri Supreme Court Reports, Vol. 25, page 205.

Bruff was afterwards tried and acquitted. He was taken back to Fort Leavenworth where he was killed in an attempt to desert a second time.

THE EXECUTION.

Mr. Clark Brown of Union, Mo., who has compiled a History of Franklin County, writes: "There is no local newspaper giving an account of the hanging of Worrell. I have, however, the report of eye-witnesses. After the conviction in our circuit court he was taken to St. Louis for safekeeping. Sheriff R. R. Jones assigned the duty to Deputy Sheriff Amos W. Maupin. George Holtgriewe, who is yet living, says that as a livery boy he drove Maupin and his prisoner to Washington, a distance of ten miles, to take the train to St. Louis; that an ordinary two-seated spring wagon was used; that he sat on the front seat alone and Maupin and the prisoner on the back; that both were dressed in ordinary costume, but Worrell had a light duster thrown over his lap to conceal his handcuffs; and that no one meeting them would have supposed that they were carrying a criminal condemned to death. Holtgriewe says that when Maupin brought him from St. Louis to be hanged they came the same way, and he draws a contrast of this old-time sheriff's officer bringing a murderer to his death and the large number of detectives and special officers which are now considered necessary to take a convict or suspected murderer from place to place. Worrell knew that any attempt to escape meant instant death and that Maupin was a quick, accurate shot, fearless and cool."

Worrell was executed in June, 1857, by hanging in an open field in Union in the presence of 1,000 people, his parents standing at the foot of the gallows as the drop fell.—"Bench and Bar of Mo." (Bay) p. 472.

THE TRIAL OF JOHN HODGES FOR TREASON, BALTIMORE, MARYLAND, 1815.

THE NARRATIVE.

During the war of 1812, while the British army was retreating from Washington, four stragglers and a deserter were captured by the people of a town in Maryland, through which the army passed. On discovering this the British commander sent a demand to the town that the prisoners were to be delivered up at once or he would return and burn it. A committee of the towns people decided that they must save it from being laid in ashes and John Hodges and another were appointed to demand the prisoners from the guard that had taken charge of them. They did so, and obtaining possession of the prisoners returned them to the British officer.

John Hodges, for his share in the transaction, was indicted for High Treason in the United States Court at Baltimore; but the jury's verdict was not guilty, they being of the opinion that though he may have "given aid and comfort" to the enemy, the circumstances under which he acted formed a good and sufficient excuse.

THE TRIAL.[1]

In the Circuit Court of the United States, Baltimore, Maryland, May, 1815.

HON GABRIEL DUVALL,[2]
HON JAMES HOUSTON,[3] } *Judges.*

The prisoner, *John Hodges,* having been previously indicted for the crime of High Treason, his trial began

[1] *Bibliography.* *"Report of the Trial of John Hodges, Esq., on a Charge of High Treason. Tried in the Circuit Court of the United States for the Maryland District, at the May Term, 1815. Baltimore, 1815."

[2] DUVALL, GABRIEL. (1752-1844.) Born and died Prince George

today. A jury was duly impanelled, and a plea of *not guilty* made.

Elias Glenn,[4] District Attorney, for the Government.

William Pinkney,[5] *Thomas Jenyngs,*[6] *Upton S. Heath*[7] and *John E. Hall,*[8] for the Prisoner.

Mr. Glenn, District Attorney, opened the case by stating that treason was a crime of the deepest dye, which all nations had punished with exemplary severity. In the United States, he said, it had been limited to two species, viz: levying war, and adhering to the enemy, giving him aid and comfort.—Laws U. S., April, 1790, Sec. 1.

It was the second species of treason of which the prisoner stood accused; and it had been committed under the following circumstances:

While the British army was on the retreat from the city of Washington last summer, as they passed through Prince

County, Md. Clerk Colonial Legislature; Member of Congress, 1794; Presidential Elector, 1796-1800; Judge Maryland Supreme Court, 1796; Controller U. S. Treasury, 1802-1811; Associate Justice Supreme Court of the United States, 1811-1835.

[3] HOUSTON, JAMES. (1767-1819.) Born Chestertown, Md.; Admitted to Bar, 1806; United States District Judge, District of Maryland, 1806-1819.

[4] GLENN, ELIAS. (1770-1846.) Born Elkton, Md.; United States District Attorney, 1812-1820; United States District Judge, District of Maryland, 1824-1836; Died in Baltimore.

[5] PINKNEY, WILLIAM. (1764-1822.) Born Annapolis, Md.; Member Convention which ratified the Constitution; Envoy Extraordinary (1806) and Minister Plenipotentiary (1808) to England; Settled in Baltimore, 1811; State Senator, 1812; Attorney General, 1812-1814; Member of Congress, 1791-1793, 1815-1817; Minister to Russia and Envoy to Naples; United States Senator, 1819-1822; Died in Washington.

[6] Probably THOMAS JENNINGS, though the name is spelt *Jenyngs* in the original report. In the Baltimore directory (1814-15) the only man of this name is a "Thomas Jennings, att'y at law." Up to 1833 the name continues to appear in the Baltimore directories. Scharf's Chronicles of Baltimore (1874), p. 163, mentions a "Thomas Jennings," who in 1778 declined an appointment as Attorney General. Hall's Baltimore, Its History and Its People (Vol. 1, p. 622) mentions among the men prominent in the pre-revolutionary times a "Thomas Jennings."

[7] HEATH, UPTON S. (1785-1852.) Born Maryland. A leader of the Maryland Bar and though never married, was the head and sup-

George county, some of the people of the town of Upper Marlborough took four stragglers who were following the army. They were sent into the interior of the country together with a deserter. As soon as they were missed they were demanded by the British commander, under a threat that the town should be destroyed if he were not obeyed. Communications passed between the two parties, the result of which was, that the men were restored, or placed in a situation to be taken by the enemy. In effecting this restoration, the prisoner was among the most active. In a moral point of view, some excuse might be found for his conduct; but with regard to the deserter, there was no excuse, moral, legal, or political. Deserters, it is well known, are always put to death; and, in order to save my property, I have no right to immolate the lives of my fellow creatures.

port of a large family of relatives. United States District Judge, District of Maryland, 1836-1852; Died in Baltimore.

[8] HALL, JOHN ELIHU. (1783-1829.) Born Philadelphia; Educated at Princeton; Studied law and began practice in Baltimore, 1805; Professor of Rhetoric and Belles-lettres, University of Maryland; An active Federalist; Severely wounded in the Baltimore Riots of 1812; Edited, 1808-1817, "The American Law Journal;" Removed to Philadelphia where, from 1817 to 1827, he edited the "Portfolio," contributing to it the "Memoirs of Anacreon," which attracted much attention; Edited "The Philadelphia Souvenir," (1827), and published original and selected "Memoirs of Eminent Persons." His other publications include "The Practice and Jurisdiction of the Court of Admiralty" (Baltimore, 1809); "Life of Dr. John Shaw," prefixed to his collected poems (1810), an English edition of Emerigon's "Maritime Laws," with other matter (1811); "Tracts on Constitutional Law, Containing Mr. Livingston's Answer to Mr. Jefferson" (Philadelphia, 1813), and an edition of William Wirt's "British Spy," to which he contributed several letters; Died at Philadelphia.

No mention is made anywhere of Hall's connection with this case. He is, however, the only J[ohn] E. Hall in the Baltimore directory for 1810, 1814-1815, where he is cited "att'y at law." See Appleton's Cyclopedia of American Biography, 1915; Drake's Dictionary of American Biography, 1907; Herringshaw's American Biography, 1907; Philadelphia National Gazette, June 13, 1829; Philadelphia U. S. Gazette, June 13, 1829; The "Portfolio," Vol. 13, p. 190 (mentions Hall); Philadelphia Directory, 1819-1829; Baltimore Directory, 1810, 1814-1815.

THE WITNESSES FOR THE PROSECUTION.

William Caton. Was sent by the governor last August to Queen Anne on business; saw John Randall guarding some prisoners and a deserter. The two Hodges, prisoner and his brother, rode up and demanded them. They said that a detachment of the British army had entered the town the evening before, and required them, and they had declared, that unless they were returned before 12 o'clock the next day, they would lay the town in ashes. I told prisoner if he surrendered the deserter he was no American—he would stain his hands with human blood. He replied that he knew what he was about, and wanted none of my advice. He was very much agitated, and appeared to have rode very hard; said his wife and children were held at stake.

Jno. Randall, Jr. Saturday, after the engagement at Bladensburgh, General Bowie brought three prisoners to Queen Anne and asked me to stand guard over them, which I did; during the night Mr. William Lansdale brought another—the deserter.

Early in the morning the two Hodges appeared and demanded them; they said that the British had threatened to destroy the town unless this requisition was obeyed before 12 o'clock, etc., and that they would hold their wives and children as hostages. I sent for General Bowie, who at first refused to suffer them to go; upon an explanation of the threat, he said it was hard, but he supposed they must be returned. Nothing was said particularly of the deserter in the presence of Hodges, that I know of. It was not until the next day that I heard one was a deserter; delivered all the prisoners to the two Hodges and Lansdale. It was agreed that Holden, the deserter, should not be taken further than Hall's mill, which is about a mile from Upper Marlborough.

General Bowie. On Saturday, while the enemy was retreating from the city, was at my son's farm, seven miles from Nottingham; sent my son and Mr. Oden to reconnoitre the enemy; went to Dr. Beane's farm; in walking over it they met a British soldier whom they compelled to surrender. Three others were afterwards captured by these gentlemen and sent to Upper Marlborough. The people of that place began to be alarmed at their being kept there, because the enemy were in the vicinity. Fearing that they would release the prisoners, I called on the two Hodges and requested their assistance in removing them further into the interior. They immediately complied, and departed with three, one having previously been sent away under the care of Robert Bowie and Oden. They were taken to Queen Anne and put under guard.

I wrote to the governor at Annapolis informing him what he had done; remember particularly in this letter I said, in allusion to the co-operation of the two brothers (Hodges) that if it had not been for their promptness and patriotism I could not have got the prisoners out of Marlborough; next morning, after they had been conveyed to Queen Anne, was informed of the demand and threat made by the

British, and that they had taken Dr. Beanes and some other gentlemen of the town, whom they intended to hold as hostages; went to the place where the prisoners were confined; found the deserter there; he said that he must not be delivered up; his blood would be at our door; do not know that Hodges was present when this one was stated to be a deserter.

Never was people so universally alarmed on God's earth as the people of Upper Marlborough; death and destruction were threatening them every moment if they refused to deliver up these men.

Gustavus Hay. Was called upon by prisoner to assist in conducting the prisoners to the British lines; at first refused; Hodges said every American must do his duty without regard to danger or inconvenience; it was agreed that Robert Bowie and Brookes should go to the British and ascertain precisely what was the demand; the rest of the party, with the prisoners, was to follow at a distance; there was no time to spare, it being then near 12 o'clock.

After they had proceeded about eight miles they were met by a detachment of the enemy, headed by Major Evans, who said, "By ——, gentlemen, you'll all be ruined; you are keeping them prisoners yet." Upon seeing only four, he said, "Where are the other two?" "the men (alluding to R. Bowie and Brookes) that came to the army said there were six; you wanted to sneak off with two, did you?" Hodges or Lansdale answered, "No, we don't—they are up at that house;" pointing to one which they had just passed, and where the two had been left.

William Lansdale. Dined with Dr. Beanes, in company with General Bowie and others; he related the capture of the prisoners, and their being sent to Queen Anne, after which I went to Harry Hall's, where I found the deserter; put him on a horse and took him to Queen Anne; in the morning was awakened by Hodges, who told me of the British demand; went to the prison; Caton and Hodges got into an altercation about delivering up the deserter; Hodges said he did not mean to deliver him up.

Major Evans told me his orders were peremptorily to destroy the town if the prisoners were not returned before 12 o'clock the next day; upon the Major being asked who gave these orders, he answered "the General."

We then asked to see the general, and Major Evans undertook to conduct us; he asked where the other two were and directed me to go back for them. On my return Hodges asked him what we had done; informed him of the demand; Hodges said they could not give up the deserter. One of the British officers said, "Gentlemen, do you mean to cheat us? If you treat us in this way we shall do as we did in Spain—put you all to death and destroy every thing."

The British carried off Dr. Beanes in consequence of his agency in capturing the prisoners. Great apprehension was entertained for him.

We had no expectation of meeting the British so soon; They came upon the American

party just at a turn in the road, near General Bowie's mill.

Thomas Holden. I came to Marlborough when the army was halting at Nottingham. Met two gentlemen whom I told I was a deserter from the British; they took me to Dr. Beanes; afterwards Lansdale took me to Queen Anne, where I was confined with the others; in the morning Hodges and another person came to the door; Mr. Sparrow demanded the names of the prisoners, and told us we were to be delivered up; I begged them not to give my name; I would certainly be put to death; Hodges said to me, "I am not determined to carry you in."

We all marched on the way to the British lines; I and another prisoner were left at a house on the road, under the guard of Major Oden. After a while, a detachment of the enemy appeared in sight; I said, "I will run," and Oden gave me leave to do so; was afterwards taken and made my escape a second time.

Solomon Sparrow. Saw General Bowie, John Thomas, and Benjamin Hodges come into the town over night; Bowie told me they had taken some prisoners from the British and requested me to get a few young men to guard them till morning; next day John Hodges came and said he must take back the prisoners or the town would be burnt; heard the altercation between Caton and Hodges; Hodges told Caton he wanted not his instructions; he knew what he was about.

Robert Bowie. Hodges went with the prisoners as far as General Bowie's farm, where they were rescued by the British; witness and Oden took one up to my house; on their way met another whom we also took; next morning we were informed that the British had entered the town during the night, and carried off Dr. Beanes, Mr. Beanes, and Dr. Hill whom they intended to hold as hostages for the safety of the prisoners; was informed of the threat, etc.

Lansdale and I got into a dispute about the deserter.

Hodges proposed that some one should go to the enemy and ascertain precisely their demand. Lansdale and I went forward for that purpose; met a British officer who said that the men must be delivered up or the town should be utterly destroyed.

Benjamin Oden, Jr. Was requested by General Bowie to go with his son Robert to reconnoitre; went to Marlborough and found the enemy was gone; we went with one of the prisoners; on our way we took another; next morning Brooke and others came and begged that they should be brought back, as the British had threatened to destroy the town.

Holden never said that he was a deserter till we got to the brick house. Hodges then said they would go forward with the four prisoners; the two deserters were left in my custody; they soon ran off, and in a few minutes Major Evans came in; knocked me down; asked me where the men were; said I did not know; he threatened to set fire to the house; a woman pointed out the direction which the man had taken and he departed; shortly after, Hodges and others came up; Hodges said there was a detachment of the British in sight and we had better clear ourselves.

Thomas Sparrow. Was solicited by Randall to help guard the prisoners; Randall, Benson, Wells, and myself mounted guard that night; at 12 o'clock Lansdale came in with a deserter; next morning, Sunday, the two Hodges came with information of the threat, etc., and required that the men should be delivered up; went to consult General Bowie, who said it was very hard; that the capture was legal, but he supposed we must submit; there were three prisoners and Tom Holden, the deserter.

General Bowie (recalled). Hodges never pressed the delivery of the deserter. Dr. Beanes is a man universally esteemed and respected—in whose situation every one would feel an interest; the other hostages also were very respectable men.

THE WITNESSES FOR THE PRISONER.

Dr. Bradley Beanes. Was at my brother's on Saturday when they took one of the men (Holden) whom they conducted to town, and gave in charge to Lansdale to be conveyed to Queen Anne. In the night a detachment of British cavalry, about fifty or sixty, came to my house; Major Evans searched the house for men or arms, but finding none went away; soon afterwards Captain Brooke came; he was very much agitated; said that they had carried off Dr. Beanes and the others, and spoke of the threat; wished me to go with him to the two Hodges and persuade them to go to Queen Anne and bring back some of the prisoners, and to Robert Bowie, who had another; the two Hodges immediately agreed to go.

Mr. Robert Bowie strenuously contended that they had no right to demand his prisoner, as he did not live in the town, and acted independently of the town. If he was a deserter it would be murder; he actually shed tears in speaking of the fate of the man; told him he need not be uneasy about the deserters, that that thing could be managed; by which I thought Mr. Bowie might understand that an opportunity would be given to the deserters to make their escape.

J. Donaldson. Before daybreak was aroused by Captain Brookes, who told me of the visit and threat of the British.

Beanes and I met Holden and hailed him; he at once said he was our prisoner; never considered him as a deserter and when Hodges went for the prisoners it was impossible that he should know anything of his character, as he had not returned from Queen Anne, when the man was taken.

When Dr. Beanes wanted me to go with him in pursuit of some English soldiers I declined, because the town had capitulated, and I thought the people should take no active steps of that description.

Mr. Pinkney read an address from the grand jury to the President of the United States, in which the jurors expressed their respect for the motives of the prisoner, and prayed for a *noli prosequi.*

Mr. Glenn prayed the court to direct the jury that the mere act of delivering up prisoners or deserters is an overt act of high treason.

Mr. Pinkney. There is no law in this prayer, for it excludes that which is the essence of the offense—intention—and if it were otherwise the court has no right to instruct the jury, as if this were a civil case. No instance has occurred in modern times of an attempt to bind the jury in such a cause by the opinion of the court. What remedy is there for the party if you err? We may appeal to a higher tribunal, it is true; but what is the consequence? the man is hanged, and your judgment is reversed.

In England did their courts interfere in this mode in the celebrated cases of Hardy, and Horne Tooke and others? No. It would not have been endured. The best security for the rights of individuals is to be found in the trial by jury. But the excellence of this institution consists in its exclusive power. The jury are here judges of law and fact, and are responsible only to God, to the prisoner, and to their own consciences. After the case is closed you may indeed advise, if they ask it, or if you think proper to do so without being asked by them. But to interrupt the progress of the trial in the way proposed would be monstrous. Suppose the court to give the direction, I shall not submit to it, as the prisoner's counsel. I will, on the contrary, tell the jury that it is not law. It is my right to do so, and in a case of blood I dare not forego the exercise of it. I trust I shall not be placed in a predicament, which will thus set my duty to a man whose life is in my charge, against my respect for this tribunal. I pray your honours to suffer this cause to go on in the customary and legal manner.

Mr. Glenn observed that it was the practice every day in the criminal court, and appealed to counsel for the prisoner, whose long career as a public prosecutor must have furnished innumerable instances.

Mr. Jenyngs said that being thus called upon, he was sorry he could not aid the district attorney by any such precedent. He never knew an instance, while he was prosecutor for the state, of praying a direction on behalf of the state, though it was frequently done by the prisoner.

The COURT said they were bound to declare the law whenever they were called upon, in civil or criminal cases; in the latter, however, it was also their duty to inform the jury that they were not obliged to take their direction as the law. In the case at bar they declined giving any opinion at present, being desirous to hear counsel.

Mr. Glenn said he would not now address the jury.

Mr. Pinkney. Gentlemen of the jury: I regret that my learned friend across the table has not seen fit to come forward in support of his case, as I wished to have delivered a brief homily on the law of treason; not indeed for the benefit of my client, but for the instruction of others, who appeared to stand in need of it.

But as the District Attorney declined to support the prin-

ciples upon which the prosecution was founded, I do not think it necessary to trouble the jury with a refutation of them. I confine myself, therefore, to a few general observations.

Mr. Glenn again proposed his prayer to the consideration of the court.

In support of it, he read the following authorities: 1 East. Cro. 1. 70. If the joining with rebels be from fear of present death, and while the party is under actual force, such fear and compulsion will excuse him. But an apprehension, though ever so well grounded, of having property wasted or destroyed, or of suffering any other mischief, not endangering the person of the party, will be no excuse for joining or continuing with rebels. *Ib.*, p. 71.

2 Dall. 346. Vigol's case. This was an indictment for high treason, in levying war against the United States. Patterson, who presided in that case, said, there were two points for consideration—the facts and the intention. He stated the evidence and the design, and concluded that the combination of these facts with this design, consummated the crime of high treason, in the contemplation of the constitution and law of the United States. It may not, said the judge, be useless on this occasion to observe that the fear which the law recognizes as an excuse for the perpetration of an offense, must proceed from an immediate and actual danger, threatening the life of the party. The apprehension of any loss of property by waste or fire, or even an apprehension of a slight or remote injury to the person, furnish no excuse. Also Cranbourn's case, from Salkeld, 633. He admitted that he must prove a certain portion of the intention, and that in the present case there were but two inquiries to be made —1st, Did he deliver the prisoners? 2, Did he intend to do so? Both these questions must be answered affirmatively; and therefore the treason was proved, and he had no more to say on the subject.

Mr. Pinkney. Gentlemen, nothing but an utter confusion of ideas could have introduced a doubt upon this subject. The counsel's prayer excluded all idea of criminal intention; or it relied upon the inference of a criminal motive as a necessary corollary from the naked facts charged as the overt acts in the indictment.

It might be affirmed as an universal proposition, that criminal intention is the essence of every species of offense. All indictments commence with an assertion of corrupt motives, and in indictments for treason the overt acts laid bare are to show the manner in which the wicked intention was carried into execution. In the speeches of Lord Erskine, to whom the world is so largely indebted for a correct knowledge of the

principles of civil liberty, the law of treason, you will find him perpetually contending, and contending with effect, that although the crown had proved the facts charged, it had not shown the evil design, the corrupt purpose, without which the facts are nothing.

Let us hear what he says to the jury in the case of Lord George Gordon.

"You must find that Lord Gorge Gordon assembled these men with that traitorous intention—you must find not merely a riotous, illegal petitioning—not a tumultuous, indecent importunity to influence parliament—not the compulsion of motive, from seeing so great a body of people united in sentiment and clamorous supplication—but the absolute unequivocal compulsion of force, from the hostile acts of numbers united in rebellious conspiracy and arms.

This is the issue you are to try; for crimes of all denominations consist wholly in the purpose of the human will producing the act: *Actus non facit reum nisi mens sit rea*—the act does not constitute guilt, unless the mind be guilty. This is the great text from which the whole moral of penal justice is deduced; it stands at the top of the criminal page, throughout all the volumes of our humane and sensible laws, and Lord Chief Justice Coke, whose chapter on this crime is the most authoritative and masterly of all his valuable works, ends almost every sentence with an emphatical repetition of it.

The indictment must charge an open act, because the purpose of the mind, which is the object of trial, can only be known by actions; or, again to use the words of Foster, who has ably and accurately expressed it, 'the traitorous purpose is the treason, the overt act, the means made use of to effectuate the intentions of the heart.' But why should I borrow the language of Foster, or of any other man, when the language of the indictment itself is lying before our eyes? What does it say? Does it directly charge the overt act as in itself constituting the crime? No. It charges that the prisoner 'maliciously and traitorously did compass, imagine, and intend to raise and levy war and rebellion against the king;' this is the malice prepense of treason;—and that to fulfil and bring to effect such traitorous compassings and intentions, he did, on the day mentioned in the indictment, actually assemble them, and levy war and rebellion against the king. Thus the law, which is made to correct and punish the wickedness of the heart, and not the unconscious deeds of the body, goes up to the fountain of human agency, and arraigns the lurking mischief of the soul, dragging it to light by the evidence of open acts. The hostile mind is the crime; and, therefore, unless the matters which are in evidence before you, do beyond all doubt or possibility of error, convince you that the prisoner is a determined traitor in his heart, he is not guilty."

In that case it was proved that the prisoner incited the acts which produced the consequences complained of. Yet he was

acquitted; because he was not the enemy of the king, nor the friend of any man who was his enemy.

Take the case of a man who, in time of war, is charged with the defense of an important fortress or castle, which he surrenders to an incompetent force. What more effectual means could he have adopted to aid the enemy than the delivery of this fastness? The books all tell you that if he was bribed to this desertion of his duty, if he did it with a view to benefit the enemy, he is guilty of treason. But if pusillanimity was the cause, or if it arose from a false calculation of his own means, or the force of the enemy, he is not a traitor. You may banish him with ignominy from the ranks which he has disgraced, or try him by martial law as a coward or a fool; but he has committed no treason.

Suppose a powerful force to invade the country, to which all resistance is hopeless; they levy contributions; they do not proclaim that they will hang me if I neglect to comply with this order; but they threaten plunder and desolation. I know they have the power to execute that threat—and I comply accordingly. Now, the paying of money, or the furnishing of provisions, is an assistance—it is "giving aid and comfort," much more effectually than the delivery of a few prisoners, or a deserter. Yet no man will call this treason; because there is no evidence of hostility to the interests of the country. The authorities say it is not treason.

In Stone's case (1 East Cro. L. 79). the indictment charged as an overt act of adherence to the enemy, that the prisoner conspired, with others, to collect intelligence within England and Ireland, of the disposition of the king's subjects, in case of an invasion of either country, and to communicate such intelligence to the enemy. The tendency of parts of the correspondence, which was given in evidence, was to advise the enemy against an invasion of England, by representing the improbability of its being attended with any success, from the general disposition of the people.

Now it was scarcely possible that such a correspondence could have been opened and maintained with other than cor-

rupt motives. Yet the counsel were allowed to argue that the letters were transmitted with a good intent, in order to avert the danger of so great a calamity as an invasion. And the Court said the jury were to judge from all the circumstances, whether the intelligence had been sent with that view.

My client is charged, as Stone was charged, with being an adherent; and like him is entitled to be sheltered by his motives from the imputation of treason. The District Attorney confounds the indictment which you are now trying with an indictment for levying war. I admit that it has been decided, that if a man becomes an integral part of the enemy's force, and acts with it, he necessarily levies war, and is guilty of treason, unless it appears that he did so *pro terrore mortis*. The law will suffer no other exculpation of such conduct; it will excuse it upon no other motive. But will the gentlemen refer us to some authority which declares, that if a man, without joining the enemy so as to levy war, does, upon virtuous or even pardonable inducements (having no reference to the promotion of the enemy's views) that which happens, or is calculated to be advantageous to the enemy, he is therefore a traitor? What is an adherent? Can he be anything less than a willing partisan, a corrupt auxiliary of the enemy? Such, at least, is the natural and ordinary import of the word; and you cannot strain it beyond that import by the refinements of construction, to the prejudice of the accused, without reviving the ferocious and appalling doctrine of constructive treason, which once made England bleed at every pore, and stained the palace and the cottage with judicial murder. The protecting spirit of the constitution, and of the statute which acts upon it, as well as humanity and justice, would be outraged by such a course.

Unlike the conduct of Stone, the conduct of Hodges presents nothing ambiguous to the most zealous scrutiny. His honorable feelings and intentions are acknowledged by all. He was urged by the solicitation of those whom he respected. He was led by a generous sympathy for the situation of one who is deservedly dear to all who know him. He was actuated by

an apprehension, by no means unreasonable, for the quiet and safety of the affrighted women and helpless children of the neighborhood, and for the security of the persons and property of the whole district. The treason of adherence cannot be committed by one whose heart is warm with all the honorable feelings of the man and the patriot. "Overt acts undoubtedly do discover the man's intentions; but I conceive they are not to be considered merely as evidence, but as the means made use of to effect the purposes of the heart." Foster, 203.

This is the master key which lets you into the whole secret of this title of the criminal law. Sir Walter Tyrrel, who, in shooting at a deer, killed the king, could not be convicted of treason. The killing was *per infortunium*. So, where a person *non compos* slays another designedly; still he is innocent, because there is no malignity in his heart. So in every homicide, it is felonious, justifiable or excusable, according to the purpose with which the act was perpetrated. It is murder where it is done through malice—manslaughter, if without malice. Where it is done through misfortune, or in self-defense, it is excusable, and it is justifiable when done in advancement of public justice, in obedience to the laws. If the heart be uncontaminated by corrupt intentions the man is innocent, for it is motive that qualifies actions. As it will be with God, so it is with man. The latent intention of the heart must be searched.

Look at the *locus in quo*—the scene where the plot of this treason is laid. A hostile force, but the day before, had traversed the country in all the pride of victory. The *jus belli* was lord of the ascendant. The army, if such a force may deserve the name, which had been relied upon for the defense of the capitol, had been broken up and dissipated to every quarter of the compass. The country was menaced by an enemy, with whom, to adopt the language of Caesar, it was easier to do than to say. If I were addressing the jury I might appeal to their love of country. I might remind them that they are administering law for posterity as well as for us. But I am

addressing a tribunal where these considerations have their full weight, and I expect with confidence that the court will vindicate the doctrines which I have had the honor to advance.

DUVALL, C. J. The Court would have been better satisfied if the whole case had been gone through in the usual way, but as the District Attorney has prayed an opinion on the law, I am willing to give him mine.

Hodges is accused of adhering to the enemy, and the overt act laid consists in the delivery of certain prisoners, and I am of opinion that he is guilty. When the act itself amounts to treason, it involves the intention, and such was the character of this act. No threat of destruction of property will excuse or justify such an act. Nothing but a threat of life, and that likely to be put into execution, will justify. The jury are not bound to conform to this opinion, because they have a right, in all criminal cases, to decide on the law and the facts.

HOUSTON, J., said he did not entirely agree with the Chief Justice in any, except the last remark.

MR. PINKNEY. Gentlemen of the jury: The opinion which the Chief Justice has just delivered is not, and I thank God for it, the law of this land. If you have the slightest doubt on the subject, I will undertake to remove it—to show you that the cases have been misconceived, and that the conclusions drawn from them are erroneous.

No man can feel for the learned judge who has just given you his instruction, a reverence and affection more sincere, than I do. But reverence and affection for him shall not stand in the way of the great duty which I owe to a fellow citizen who relies on me to shield his innocence from the charge of guilt, and his life from an attainder for treason. I had hoped that, since his motives were admitted, on all hands, to be entitled to praise, since the grand jury had associated with their indictment a certificate of the purity of his views, and a solemn recommendation that the prosecution should be abandoned, he would at least have been left by the district attorney, and the court, to obtain from you, as he could, a de-

liverance from the danger that encompassed him. In that hope I have been disappointed. As if the salvation of the state depended upon the conviction of this unfortunate man—whose situation, one would think, an inquisitor might deplore—the district attorney has gone out of his way to bring down vengeance upon him; and one of the court has told you that he is a traitor, and you ought to find him so.

In a case where justice might be expected to be softened into clemency, and even to connive at acquittal, where every generous sentiment must take part with the accused, and law might be thought to fear the reproach of tyranny, if it should succeed in crushing him—in such a case the established order of trial is deserted, a pernicious novelty is introduced, the court is called upon to mix itself in your deliberations, to mutilate the defense of the prisoner's counsel, to harden your consciences against the solicitations of an enlightened mercy, and to sacrifice the prisoner to gloomy and exterminating principles, which would render the noble and beneficent system of law, for which we are distinguished, a hideous spectacle of cruelty and oppression. For the sake of the country to which I belong, as well as of my client, I will not only protest before you against these principles, but will examine and speak of them with freedom; restrained only by the decorum which this place requires.

In my argument to the court I showed that if it be done treacherously it is treason; but that if the commander act from any motive not corrupt, no indictment can touch him. if the fort be as impregnable as Gibraltar, and be garrisoned with 50,000 men, and it is surrendered to a force of half that number, from motives of fear, the commander cannot be punished as a traitor. What can be more strong to show that upon an indictment for adherence, the law looks into the heart, and adapts its penalties accordingly? Has that authority been answered?

In the case of Stone, which was parallel with the point, the court said expressly, if the heart be pure it matters not how incorrect the conduct. So the counsel argued; and

Stone was acquitted. Has any answer been given to that authority? Has any been even attempted?

This indictment charges Hodges with having done certain things wickedly, maliciously, and traitorously. Must not the United States prove what they allege? When the law allows even words to be given in evidence, as explanatory of intention, to exculpate, it admits that exculpation may be made out by proof of innocent motives:—that overt acts alone do not furnish a criterion—that concomitant facts, illustrative of the state of the heart, must not be neglected.

A military force levies contributions. If you pay them, for the purpose of saving the country from further mischief, although there be no fear or danger of death, the law says this is not treason. By the doctrine of the chief justice, however, it is treason, and consequently his doctrine is unsound.

On this occasion the enemy were in complete power in the district where the transactions occurred, which are complained of in the indictment. They were unawed by the thing which we called an army, for it had fled in every direction. They were omnipotent. The law of war prevailed, and every other law was silent. The domestic code was suspended. They menaced pillage and conflagration; and, after they had wantonly destroyed edifices which all civilized warfare had hitherto respected, was it to be believed that they would spare a petty village, which had renewed hostilities, before the seal of its capitulation was dry? There was menace—power to execute—probability—nay, certainty, that it would be executed.

How, then, can you find a wicked and traitorous motive in the breast of my client?

There is not only the absence of any wicked motive, but there is the visible presence of those which are laudable; an attachment to Dr. Beanes—anxiety for the defenseless people about him—a desire to preserve the country from the afflictions which hung over it. In conduct so characterized, so produced, we discover the operations of an excellent heart,

upon a mind which virtuous inducements could betray into error; but in what way we can distort it into treason, I have not yet been able directly to learn.

The conduct is in itself treasonable, says the chief justice: it necessarily imports the wicked intention charged by the indictment. The construction makes it treason because it aids and comforts the enemy.

These are strong and comprehensive positions; but they have not been proved; and they cannot be proved until we relapse into the gulf of constructive treason, from which our ancestors in another country have long since escaped.

Gracious God! In the nineteenth century, to talk of constructive treason! Is it possible that in this favored land—this last asylum of liberty—blest with all that can render a nation happy at home and respected abroad—this should be law? No. I stand up as a man to rescue my country from this reproach. I say there is no color for this slander upon our jurisprudence. Had I thought otherwise I should have asked for mercy—not for law. I would have sent my client to the feet of the president, not have brought him, with bold defiance, to confront his accusers, and demand your verdict. He could have had a *noli prosequi*. I confirmed him in his resolution not to ask it, by telling him that he was safe without it. Under these circumstances I may claim some respect for my opinion. My opportunities for forming a judgment upon this subject, I am compelled to say, by the strange turn which this cause has taken, are superior to those of the chief justice. I say nothing of the knowledge which long study and extensive practice enabled me to bring to the consideration of the case. I rely upon this—my opinion has not been hastily formed—since the commencement of the trial. It is the result of a deliberate examination of all the authorities, of a thorough investigation of the law of treason in all its branches, made at leisure, and under a deep sense of a fearful responsibility to my client. It depended upon me whether he should submit himself to your justice, or use, with the chief magistrate, the intercession of the grand jury, which

could not have failed to be successful. You are charged with his life and honor, because I assured him that the law was a pledge for the security of both. I declared to him that I would stake my own life upon the safety of his; and I declare to you now that you have as much power to shed the blood of the advocate as to harm the client whom he defends.

If the mere naked fact of delivery constitute the crime of treason, why not hang the man who goes under a flag of truce to return or exchange prisoners? According to the doctrine of the chief justice, this man is equally guilty with him who stands at the bar, if you are forbidden to examine his mind, but are commanded by the law to look only to his acts. I ask you to consider this, in the spirit of Stone's case: that doctrine, I pledge myself, goes through every nerve and artery of the law.

If the doctrine of the chief justice be the law of the land, every man concerned in the deeds of blood that were acted during our recent war, was a murderer. Our gallant soldiers who met and repulsed the hostile step whenever it trod upon our shores: our gallant tars who unfurled our flag, and acquired for us a name and a rank upon the ocean, which will not soon be obliterated—these are all liable to be arraigned at this bar. These men have carried dismay and death into the ranks of the foe: blood calls for blood. You dare not inquire into the causes which produced the circumstances which attended the motives which prompted these deeds of carnage. The act, you are told by the chief justice, and such is the reasoning of the attorney, involves the intent!

Gentlemen! this desolating doctrine would sweep us from the face of the earth. Even when we deserved to be crowned with laurels, we should be stretched upon a gibbet. I tremble for my children, for my country, when I reflect upon the consequences of these detestable tenets, which reduces indiscretion and wickedness to the same level. Which of you is there that in some unguarded moment may not, with honest motives, be imprudent? Which of you can hope to pass through life without the imputation of crime, if your motives

may be separated from your conduct, and guilt may be fastened upon your actions, although the heart be innocent?

Gentlemen! so solemnly, so deeply, so religiously do I feel impressed with this principle that I know not how to leave the case with you, although at the present moment it strikes my mind in so clear a light that I know not how to make it more clear.

If this damnable prosecution should prevail, it would be the duty of the district attorney, instantly to arraign General Bowie, one of the witnesses in this case, than whom a purer patriot never lived. Nay, half Prince George's county would come within its baleful influence.

Yet such is the law which the chief justice recommends to you. His associate does not concur with him. In this conflict of opinions I should be entitled to your verdict; but I rest the case upon more exalted grounds. I call upon you, as you are honourable men, as you are just, as you value your liberties, as you prize your constitution, to say—and to say it promptly—that my client is not guilty.

THE VERDICT

The *Jury*, without hesitating a moment, rendered a verdict of—*Not Guilty*.

THE TRIAL OF LEO M. FRANK FOR THE MURDER OF MARY PHAGAN, ATLANTA, GEORGIA, 1913.

THE NARRATIVE.

Saturday, April 26, 1913, was Memorial Day, a holiday, and there was no work going on in the National Pencil Company's factory at Atlanta. But Leo M. Frank, the superintendent, was in his office when, a little after noon, Mary Phagan, a white girl, fourteen years old, whose duty was to attach metal tips to pencils, and who had not been at work for a week, as the supply of metal had run out, called to get some pay which was due her. There was no one else in the building except two workmen on the top floor. Frank stated that he handed her an envelope containing $1.20; that she asked if the metal had come and that he replied, "no"; that she left his office, and that he heard her footsteps as she went away. There was no evidence that she was ever seen alive by anyone after that.

Early next morning (Sunday) Newt Lee, the negro night-watchman, found in the basement the body of Mary Phagan, strangled to death by a cord. There was a cloth tied around her head which was torn from her underskirt. There were no external signs of rape. The body was not mutilated, but there were wounds on the head and elbow and below the knee. Newt Lee was arrested, but denied all knowledge of the crime; so did Frank, who expressed a strong desire to find the murderer, and placed everything he could in the hands of the detectives to aid their search. But on April 29, 1913, Frank was arrested, and on May 24 he was indicted for the murder of the little girl.

On the trial, Newt Lee[1] testified that Frank had told him to be back at the factory at four o'clock Saturday afternoon,

[1] *Post*, p. 190.

and when he came upstairs to report, Frank, rubbing his hands, met him and told him to go out and have a good time until six o'clock. When Lee returned Frank changed the slip in the time clock, manifesting nervousness and taking a longer time than usual. When Frank went out of the front door of the factory that afternoon, he met a man named Gantt whom he had discharged a short time before. Frank looked frightened. Gantt declared he wished to go upstairs and get some shoes he had left there which permission Frank finally granted, stating that he thought they had been swept out. About an hour after this occurrence Frank called up Lee over the telephone from his home, a thing he had never done before and asked him if everything was all right at the factory. Lee found the double inner doors locked which he had never found that way before. Subsequently when Lee was arrested and Frank was requested by the detectives to go in and talk to him and find out what he knew, Lee testified that Frank dropped his head and stated "If you keep that up we will both go to hell." On Sunday morning the police officers telephoned to Frank that the girl's body had been discovered and that they were coming to take him to the undertaker's where it was. When they came he was very nervous and trembled, and at the undertaker's showed a disinclination to look at the body and did not go into the room where it lay, but turned away at the door.[2] Another female employed at the factory swore that at the time when, the State contended, Mary Phagan and Frank were in the metal room she was in Frank's office and he was absent, although he had declared he had not left the office at all during that time.[3]

One witness swore that on Monday morning he found six or seven strands of hair in the lathe which he worked, and which were not there on Friday.[4] Several witnesses testified that the hair was like that of Mary Phagan, although Dr. Harris, comparing Mary Phagan's hair with that on the

[2] W. W. Rogers, *post*, p. 192.
[3] Monteen Stover, *post*, p. 197.
[4] R. P. Barrett, *post*, p. 197.

lathe under a microscope, gave his opinion that it was not her hair.[5] Other witnesses said they thought they saw blood on the floor near the dressing room, at which place Conley said he dragged the body, and that it was not there on Friday.[6] Other witnesses who examined the floor said the spots looked like blood stains, but they were not sure,[7] and there was testimony that there were frequent injuries at the factory, and blood was not infrequent. A part of what they thought to be blood was chipped from the floor and Dr. Claude Smith testified that on one of the chips, he found under a microscope, from three to five blood corpuscles, but he could not say that it was human blood.[8]

Near the body in the basement there were found two notes in a negro's handwriting, one written on brown paper and the other on a leaf of scratch pad. That written on white paper contained these words: "He said he would love me, laid down play like the night-witch, did it, but that long tall black negro did boy hisself." On the brown paper, which was the carbon sheet of an order blank, was written the following: "Mam that negro fire down here did this when i went to make water and he push me down a hole a long tall black negro did (had) it. i right while play with me."[9]

But the startling evidence, and that upon which the conviction of Frank was based was that given by a dissolute and good-for-nothing negro, Jim Conley, a man 27 years of age, and one who had frequently been in the chain-gang. Conley had worked at the factory for about two years, and in the basement about two months, and had run the elevator, also. The detectives learned, about the middle of May, that Conley could write, although at first he denied it. He made, before the trial, one statement and three affidavits about his connection with the matter.

[5] This opinion seems to have been given later on a motion for a new trial.
[6] R. P. Barrett, *ante.*
[7] J. N. Starnes, *post,* p. 192; J. L. Beavers, *post,* p. 199.
[8] *Post,* p. 200.
[9] *Post,* p. 244.

On the trial Conley testified that he was asked by Frank to come to the factory on Saturday and watch for him as he had previously done, which he explained meant that Frank expected to meet some woman and when Frank stamped his foot Conley was to lock the door leading into the factory, and when he whistled he was to open it. He said he occupied a dark place at the side of the elevator behind some boxes, where he would be invisible. He swore he saw several people, including male and female employees, go up the steps to the second floor where Frank's office was located; that Mary Phagan went up, that he heard in a few minutes footsteps going back to the metal room; that he heard a scream and then he dozed off. In a few minutes Frank stamped and he locked the door, and then Frank whistled, when he unlocked the door and went up the steps. Frank was shivering and trembling and told Conley, "I wanted to be with the little girl and she refused me and I struck her, and I guess I struck her too hard, and she fell and hit her head against something, and I don't know how bad she got hurt. Of course you know I ain't built like other men." Conley said that he found Mary Phagan in the metal room, some 200 feet from the office, with a cloth tied about her neck and under the head, as though to catch blood, although there was no blood at the place. Frank told him to get a piece of cloth and put the body in it, and Conley got a piece of striped bed-tick and tied the body in it and called on Frank for assistance in carrying it. Frank went to his office and got a key and unlocked the switchboard in order to operate the elevator to the basement, where Conley rolled the body off the cloth. They went back into Frank's private office and just at that time Frank said: "My God, here is Emma Clark and Corintha Hall," and Frank then put Conley into the wardrobe. After they left, Frank let Conley out and asked Conley if he could write, to which Conley said "yes". Frank then dictated the letters just referred to and then took out of his desk a roll of greenbacks and said, "Here is $200," but after a while requested the money back and got it.[10]

[10] *Post*, p. 202.

Frank denied the truth of Conley's story *in toto* and said that Mary Phagan came into his office about noon, that he gave her the envelope and that she left him and he had never seen her since. He introduced nearly one hundred witnesses as to his good character, including citizens of Atlanta, college mates at Cornell, and professors of that college.

And the defense produced the statement and affidavits Conley had made before the trial to the officers of the law.[11] In the first, on May 13, he gave a minute detail of his actions on the 26th of April; the saloons he visited and the whiskey and beer he bought, and itemized the denomination of the money he had and what he spent for beer, whiskey and sausage. He said nothing about Frank or Mary Phagan. On May 24 he made an affidavit in which he said that on Friday before the Saturday on which the murder was committed Frank asked him if he could write, and he dictated to him practically the contents of one of the notes found by the body of Mary Phagan. Frank then took a brown scratch pad and wrote on that himself and then gave him a box of cigarettes in which was some money, and Frank said to him that he had some wealthy relatives in Brooklyn and "Why should I hang?" On May 28, 1913, Conley made for the detectives another affidavit in which he stated that on Saturday morning, after leaving home, he bought two beers for himself, and then went to a saloon and won 90 cents with dice; that he bought two more beers and a half pint of whiskey, some of which he drank; that he met Frank in the street and they went over to the factory and he told him to sit down on the step until he whistled. Conley mentioned various people whom he saw from his place of espionage going up the stairs to Mr. Frank's office. Then Frank whistled to him and he came up the stairs and Frank was trembling, and he and Frank went into the private office when Frank exclaimed that Miss Emma Clark and Corinthia Hall were coming, and concealed Conley in the wardrobe. Conley said that he stayed in the wardrobe a pretty good while, for the whiskey and the

[11] *Post*, pp. 244-250.

beer had gotten him to sweating. Then Frank asked him if he could write and Frank made him write at his dictation three times, and Frank told him he was going to take the note and send it in a letter to his people and recommend Conley to them. Frank said, "Why should I hang?" Frank took a cigarette from a box and gave the box to Conley and when Conley got across the street he found it had two paper dollars and two silver quarters in it, and Conley said "Good luck has done struck me." At the beer saloon he bought one-half pint of whiskey and then got a bucket and bought fifteen cents' worth of beer, ten cents' worth of stove wood and a nickel's worth of pan sausage, and gave his old woman $3.50. He did not leave home until about 12 o'clock Sunday. On Tuesday morning Frank came up stairs and told him to be a good boy. On Wednesday, Conley washed his shirt at the factory, and hung it on the steam pipe to dry. The detectives took the shirt and, finding no blood on it, returned it. On the 29th of May, 1913, Conley made another affidavit in which he said that Frank told him that he picked up a girl and let her fall and Conley hollowed to him that the girl was dead, and told him to go to the cotton bag and get a piece of cloth, and he got a wide piece of cloth and took her on his right shoulder, when she got too heavy for him and she slipped off. He called Frank to help, and Frank got a key to the elevator and the two carried the body down stairs and Frank told him to take the body back to the sawdust piles, and Conley picked the girl up and put her on his shoulder, while Frank went back up the ladder. Conley then took the cloth from around her and took her hat and slipper, which he had picked up upstairs where her body was lying, and brought them down and untied the cloth and brought them back and "throwed them on the trash pile" in front of the furnace.

When Frank was arrested and indicted for the murder there was intense excitement and feeling in Atlanta—lynching was feared, and the Governor of the state had the military in readiness to protect the prisoner if the jail was attacked. And during the trial the spectators again and

again manifested their resentment towards the prisoner; they applauded the State counsel more than once, and the crowd in the streets cheered the prosecuting attorneys as they entered and left the court house. And when the jury was ready to deliver the verdict, the judge requested that both the prisoner and his counsel should be absent from the court room when the verdict was rendered, in order to avoid any possible demonstration in the event of an acquittal.

The jury returned a verdict of guilty, which was received with cheers by the waiting crowd in the streets, who carried the prosecuting attorney, when he left the court house, to his office on their shoulders. The next day Frank was sentenced to be hanged. Then began a long fight in the courts, from the trial court to the Supreme Court of the State and finally to the Supreme Court of the United States. But every court he appealed to refused to disturb the verdict of the jury. So did the State Board of Pardons. The Governor, however, after a long and careful study of the evidence, came to the conclusion that there was a reasonable doubt of his guilt, and commuted his sentence to imprisonment for life.

After he was taken to prison he was attacked by a fellow-convict who stabbed him in the neck, the wound being almost fatal. He had barely recovered from this when, on the night of August 16, 1915, a number of men broke into the prison, overpowered the guards, and carried him in an automobile a distance of 125 miles to Marrietta, where little Mary Phagan was buried, and there in the early morning hanged him to a tree.

THE TRIAL.[12]

In the Superior Court of Fulton County, Atlanta, Georgia, July, 1913.

HON. LEONARD S. ROAN,[13] *Judge.* *July 28.*

Leo M. Frank, having on May 24, 1913, been indicted by the grand jury of the County for the murder of Mary Pha-

[12] *Bibliography.* *"In the Supreme Court of Georgia, Fall Term, 1913. Leo M. Frank, Plaintiff in Error, vs. State of Georgia, De-

gan, on April 26, 1913, and having been arraigned and pleaded not guilty the trial began today.

Hugh M. Dorsey,[14] Solicitor General; *Frank A. Hooper,*[15] and *E. A. Stephens,*[16] Assistant Solicitor, for the State.

Reuben R. Arnold,[17] *Luther Z. Rosser*[18] and *Herbert Haas,*[19] for the Prisoner.

fendant in Error. In Error from Fulton Superior Court at the July Term, 1913. Brief of the Evidence."

[8]"Argument of Hugh M. Dorsey, Solicitor General, Atlanta Judicial Circuit, at the Trial of Leo M. Frank, Charged with the Murder of Mary Phagan. Published by N. Christophulos, 411 Third Street, Macon, Ga."

[9]"The Trial of Leo Frank. Reuben R. Arnold's Address to the Court in His Behalf. Introduction by Alvin V. Sellers. Baxley, Ga., Classic Publishing Co. 1915."

The Atlanta *Constitution,* July 29, 1913, to August 27, 1913.

The Atlanta *Journal,* July 29, 1913, to August 27, 1913.

Hearst's Atlanta *American,* July 29, 1913, to August 27, 1913.

[13] ROAN, LEONARD STRICKLAND. (1849-1915.) Born Henry County, Ga. Admitted to the Bar, 1870; practiced law in Fairburn, Campbell County, Ga., until appointed Judge of the Superior Court of the Stone Mountain Circuit, 1900. Judge of the Court of Appeals of Georgia, 1913-15. He died February 23, 1915.

[14] DORSEY, HUGH MASON. Born Fayette County, Georgia, 1871; graduated University of Georgia, 1891; graduated in law University of Virginia, 1892; admitted to the Bar in Atlanta, where he practiced until 1910, when he was appointed Solicitor General of the Atlanta Circuit. He held this office until October, 1916, when he was elected Governor of Georgia, which office he now holds.

[15] HOOPER, FRANK ARTHUR. Born Floyd County, Georgia, 1866; graduated Mercer University, 1885; admitted to Bar, 1886; Solicitor General of the Southwestern Circuit, 1896-1908.

[16] See *post,* p. 628.

[17] ARNOLD, REUBEN ROSE. Born Atlanta, Ga., 1868; graduated High School, Atlanta, 1885; attended University of Georgia, 1885-1886; studied law in the office of his father, Reuben Arnold, a member of the Atlanta Bar, and was admitted to the Bar December, 1886. Has practiced law in Georgia and adjoining states from the date of his admission until the present time. Has never held any public office and has never been a candidate for any public office.

[18] ROSSER, LUTHER ZEIGLER. Born Gordon County, Ga., 1859; graduated Emory College (Oxford), 1878; admitted to Bar (La Grange, Ga.), 1880; practiced law, Campbell County, until 1884, when he moved to Atlanta, and has practiced law in Atlanta since.

[19] HAAS, HERBERT JOSEPH. Born 1884; graduated Columbia University, 1903; Columbia Law School, 1905; practiced law in Atlanta since.

The following jurors were selected and sworn: F. E. Winburn (foreman), M. S. Woodward, D. Townsend, A. L. Wisbey, W. M. Jeffries, M. Johenning, J. T. Osborn, F. V. L. Smith, A. H. Henslee, W. F. Medcalf, C. J. Bosshardt, J. F. Higdon.

THE WITNESSES FOR THE STATE.

Mrs. J. W. Coleman. Am Mary Phagan's mother; last saw her alive the 26th April, 1913, at home. About 11:30 she ate some cabbage and bread. She left home at a quarter to 12 to go to the pencil factory for her pay. She would have been fourteen 1st of June, was fair complected, very pretty, extra large for her age. She had on a lavender dress, trimmed in lace, and a blue hat. She had dimples in her cheeks.

Cross-examined. George Epps was a friend of Mary's to a certain extent.

Mr. Rosser. Did you not tell a neighbor that she detested the Epps boy. (Question objected to and withdrawn.)

George Epps. Am fourteen years old; live around the corner from Mary Phagan's home; last time I saw her was Saturday morning coming to town on the English Avenue car; about 10 minutes to 12 she was going to the pencil factory to draw her money; left her about 7 minutes to 12, corner of Forsyth and Marietta streets; said she would meet me at the drug store to see the parade at 2; was there; she never showed up, so I went to the ball game.

Cross-examined. Knew the time because I looked at the clock just before I took the car; I can tell the time by the sun; Mary got on and off the car with me; she went toward the Pencil Factory.

Newt Lee. Was night watchman at the pencil factory; on Friday, 25th April, Mr. Frank told me "Tomorrow is a holiday and I want you to come back at 4 o'clock, I want to get off a little earlier;" got to the factory on Saturday about 3 or 4 minutes before 4.

Mr. Frank came to the door, rubbing his hands and saying he was sorry I had come so early; told him I needed sleep, and was sorry, too. He said go out in town and have a good time, because I needed it; told him I could lie down in the packing room, but he said I needed a good time, to go down town and stay one hour and a half, and to be sure and be back at six o'clock; went out the door and stayed until about four minutes to six. When I came back the doors were unlocked just as I left them; Mr. Frank says, "What time is it?" I says, It lacks two minutes of six. He says, "Don't punch yet, there is a few worked today and I want to change the slip." He took a long time to change it, he fumbled and was nervous. When Mr. Frank put the tape in I punched and went on down stairs. Mr. Gantt came from across the street from the beer saloon and says, "Newt, I got a pair of old shoes that I want to

get upstairs to have fixed." I says, "I ain't allowed to let anybody in here after six o'clock." Mr. Frank come busting out of the door and run into Gantt unexpected and he jumped back frightened. Gantt says, "I got a pair of old shoes upstairs, have you any objection to my getting them?" Frank says, "I don't think they are up there, I think I saw the boy sweep some up in the trash the other day." And he dropped his head down just so, then says, "Newt, go with him and stay with him and help him find them;" went up there with Mr. Gantt and found them in the shipping room. Mr. Frank phoned me that night about an hour after he left, sometime after seven o'clock. He says "How is everything?" and I says, Everything is all right so far as I know, and he says, "Good-bye." That is the first time he ever phoned me on a Saturday night, or at all.

Made my rounds regularly every half hour Saturday night. About three next morning went down the basement and discovered the body there; found the body of the girl then. Got up the ladder and called up police station; carried the officers down where I found the body; tried to get Mr. Frank on the telephone when the officers came; saw Mr. Frank Sunday morning about 8; he looked down on the floor and never spoke to me.

On Tuesday night, April 29, I had a conversation at the station house with Mr. Frank. I said, Mr. Frank, it's mighty hard for me to be handcuffed here for something I don't know anything about. He said, "What's the difference, they have got me locked up and a man guarding me." I said, Mr. Frank, do you believe I committed that crime, and he said, "No, Newt, I know you didn't, but I believe you know something about it." I said, Mr. Frank, I don't know a thing about it, no more than finding the body. He said, "We are not talking about that now, we will let that go. If you keep that up we will both go to hell," then the officers came in.

Cross-examined. Mr. Frank and Mr. Gantt had had a difficulty. Mr. Frank had told me, "Lee, I have discharged Mr. Gantt, I don't want him in here, keep him out of here." He didn't give me any different instructions on that Saturday, he didn't tell me not to go in the basement or in the metal department. When I was in the basement one of the policemen read the note that they found. They read these words, "The tall, black, slim negro did this, he will try to lay it on the night" and when they got to the word "night," I said, They must be trying to put it off on me. I didn't say, Boss, that's me.

L. S. Dobbs. Am a sergeant of police. On the morning of April 27th, about 3:25, a call came from the pencil factory that there was a murder there. The negro opened up the door and said there was a woman murdered in the basement. The girl was lying on her face; couldn't tell whether she was white or black, only by her golden colored hair. Her face was full of dirt and dust, and was swollen and black. The cord was around her neck; sunk into the flesh; she also had a piece of her underclothing around her

neck. The tongue was protruding. The scratch pad was also lying on the ground close to the body; found the notes under the sawdust, lying near the head. The body was that of Mary Phagan.

Cross-examined. Lee told us it was a white woman. We didn't know until the dust was removed from her face and we pulled up the clothes and looked at the skin. There was a pile of trash near the boiler. The hat was on the trash pile, so was the shoe. Everything was gone off of it, ribbons and all. It looked like she had been dragged by her feet on her face; thought she had been dragged in the basement, but couldn't be positive.

The blood was dry. The little trail where I thought showed the body was dragged went straight on down where the girl was found. The body was cold and stiff. Hands folded across the breast.

J. N. Starnes. Am a city officer; went to the pencil company's place between 5 and 6, April 27th. I called Mr. Frank on the telephone, and told him I wanted him to come to the pencil factory right away. He said he hadn't had any breakfast; he asked where the night watchman was; told him it was very necessary for him to come and if he would come I would send an automobile for him, and I asked Boots Rogers to go for him. Mr. Frank appeared to be nervous; he was in a trembling condition. I saw splotches that looked like blood about a foot and a half or two feet from the end of the dressing room; something had been thrown there and spread out and splattered; looked as if something had been swept over it, some white substance; it looked like blood, but can't say that it was.

W. W. Rogers. Saturday night, April 26th, went to Mr. Frank's residence; Mr. Black was with me. Mrs. Frank opened the door. Mr. Frank stepped into the hall through the curtain. He was dressed for the street with the exception of his collar, tie, coat and hat. Mr. Frank asked Mr. Black if anything had happened at the factory, and then me if anything had happened at the factory. I didn't answer. Mr. Frank said, "Did the night watchman call up and report anything to you?" Mr. Black said, "Mr. Frank, you had better get your clothes on and let us go to the factory and see what has happened." Mr. Frank said that he thought he dreamt in the morning about 3 a. m. about hearing the telephone ring. Mr. Frank seemed to be extremely nervous. His questions were jumpy. He was rubbing his hands when he came through the curtains. He moved about briskly. He seemed to be excited. He asked questions in rapid succession. Mr. Frank and Mr. Black got on the rear seat and I took the front seat; one of us asked Mr. Frank if he knew a little girl by the name of Mary Phagan. Mr. Frank says: "Does she work at the factory?" I said, I think she does. Mr. Frank said, "I cannot tell whether or not she works there until I look on my pay roll book, I know very few of the girls that work there. I pay them off, but I very seldom go back in the factory." One of us suggested that we take Mr.

Frank by the undertaking establishment and let him see if he knew this young lady. Mr. Frank readily consented, so we got out and went in. The corpse was lying in a little kind of side room to the right of a large room. Didn't see Frank look at the corpse; don't remember that Mr. Frank ever followed me in this room. He may have stopped on the outside of the door, but my back was toward him; he could not have seen her face because it was lying over towards the wall. We asked Mr. Frank if he knew the girl, and he replied that he didn't know whether he did or not but that he could tell whether she worked at the factory by looking at his pay roll book. As we were leaving Mr. Frank's house, he asked Mrs. Frank to telephone Mr. Darley to come to the factory. From the undertaker's we went to the pencil factory; he opened the safe, took out his time book, ran his finger down until he came to the name Mary Phagan, and said, "Yes, Mary Phagan worked here, she was here yesterday to get her pay." He said, "I will tell you about the exact time she left there. My stenographer left about 12 o'clock, and a few minutes after she left the office boy left and Mary came in and got her money and left." He said she got $1.20 and he asked whether anybody had found the envelope that the money was in. He then wanted to see where the girl was found. Mr. Frank went around by the elevator, where there was a switch box on the wall and Mr. Frank put the switch in. The box was not locked; the insurance company told him that he would have to leave it unlocked. In the basement Mr. Frank made the remark that Mr. Darley had worked Newt Lee for sometime out at the Oakland plant and that if Lee knew anything about the murder that Darley would stand a better chance of getting it out of him than anybody else. After we came back from the basement, Mr. Frank says, "I had better put in a new slip, hadn't I, Darley?" Darley told him yes to put in a slip. Frank lifted out the slip and saw the slip was punched correctly. Mr. Frank then put in a new slip, closed the door, locked it and took his pencil and wrote on the slip that he had already taken out of the machine, "April 26, 1913." I looked at the slip that Mr. Frank took out, the first punch was 6:01, the second one was 6:32 or 6:33. He took the slip back in his office. I glanced all the way down and there was a punch for every number. The officers showed him where the body was found and he made the remark that it was too bad or something to that effect. When we left the factory, Newt Lee was under arrest; never considered Mr. Frank as being under arrest at that time.

Cross-examined. Never saw Mr. Frank until that morning. Mr. Frank readily consented to go to the undertaker's with us; at the undertaker's don't know that he didn't get a glance at the corpse, but no one but Mr. Gheesling and I at this moment stepped up and looked at the little girl's face. What Mr. Frank and Mr. Black saw behind my back, I can't say.

Grace Hicks. Knew Mary Phagan a year at the pencil factory; worked in the metal room. Mary's machine was right next

to the dressing room. In going to the office from the closets one would pass the dressing room and Mary's machine within two or three feet. Mr. Frank would pass through the metal department looking around every day.

Cross-examined. Standing at the time clock you can't see into Mr. Frank's private office. A person wouldn't see from Mr. Frank's office any one coming in or out of the building; worked at the factory five years. In that time Mr. Frank spoke to me three times. Never saw Mr. Frank speak to Mary Phagan or Mary Phagan speak to Mr. Frank. When Mr. Frank came through the metal department he never spoke to any of the girls; just went through and looked around.

John R. Black. Am a city policeman; went over to Frank's house with Boots Rogers. Mrs. Frank came to the door; stated that I would like to see Mr. Frank; Mr. Frank stepped out from behind a curtain. His voice was hoarse and trembling and nervous and excited; asked if something had happened at the pencil factory and if the night watchman had reported it; asked him if he knew Mary Phagan; told him she had been found dead in the basement of the pencil factory. He said he didn't know any girl by the name of Mary Phagan, that he knew very few of the employes; at the undertaker's Mr. Frank gave a casual glance at her and stepped aside; couldn't say whether he saw the face of the girl or not. He said as we left that he didn't know the girl but he believed he had paid her off on Saturday; thought he recognized her being at the factory on Saturday by the dress that she wore but he could tell by going over to the factory and looking at his cash book. At the pencil factory he took the slip out, and said it had been punched correctly. Tuesday night Mr. Scott and myself suggested to Mr. Frank to talk to Newt Lee. Mr. Frank spoke well of the negro, said he had always found him trusty and honest. They went in a room and stayed from about 5 to 10 minutes alone. Mr. Frank stated that Newt still stuck to the story that he knew nothing about it. Mr. Frank stated that Mr. Gantt was there on Saturday evening and that he told Newt Lee to let him go and get the shoes but to watch him, as he knew the surroundings of the office. After this conversation Gantt was arrested. Frank made no objections to talking to Newt Lee. He was nervous on Monday. After his release he seemed very jovial.

Cross-examined. At the coroner's inquest Mr. Frank answered every question readily. At the pencil factory Mr. Frank went to the safe and unlocked it, got the book, ran his finger down until he came to the name of Mary Phagan, and says, "Yes, this little girl worked here and I paid her $1.20 yesterday." We went all over the factory that day. Nobody saw that blood spot that morning; must have been thirty people there during that day. Mr. Starnes was there with me. He didn't call attention to any blood spots. Chief Lanford was there, and he didn't discover any blood spots; found a bloody shirt in the bottom of a clothes barrel at Newt Lee's on Tuesday morning.

J. M. Gantt. Was shipping clerk at National Pencil Com-

pany; was discharged April 7th by Mr. Frank for alleged shortage in pay roll; have known Mary Phagan when she was a little girl. One Saturday afternoon she came in the office to have her time corrected, and after I had gotten through Mr. Frank came in and said, "You seem to know Mary pretty well," I had not told him her name. On April 26th, about 6, saw Newt Lee sitting out in front of the factory, remembered I left a pair of shoes up there and asked Newt Lee about my getting them, and he said he couldn't let me up. Mr. Frank was coming down the stairway, when he saw me he kind of stepped back. I said Howdy, Mr. Frank, and he kind of jumped; told him I had a pair of shoes up there I would like to get and he said, "Do you want to go with me or will Newt Lee be all rght? What kind of shoes were they?" I said, They were tan shoes, he said, "I think I saw a negro sweeping them up the other day." I said, Well, I have a pair of black ones there, too; he said "Newt, go ahead with him and stay with him until he gets his shoes." I went up there and found both pair where I had left them. Mr. Frank looked pale and nervous.

Mrs. J. A. White. Saw my husband at the pencil factory at 11:30; stayed there until about 10 minutes to 12. I left him there and came back about 12:30 and left again about 1 o'clock; at 11:30 saw Miss Hall, the stenographer, Mr. Frank and two men; asked Mr. Frank if I could see my husband. He said I could and sent word by Mrs. Emma Freeman; talked to him about 15 minutes and went on out; returned about 12:30; Mr. Frank was in the outside office standing in front of the safe; asked him if Mr. White had gone back to work. He jumped like I surprised him and turned and said, "Yes;" went upstairs then to see Mr. White. When I came down Mr. Frank was sitting in the outside office writing at a table. As I was going on down the steps saw a negro sitting on a box close to the stairway on the first floor.

Harry Scott. Am Superintendent of the local Pinkerton Detective Agency; have worked on this case with John Black, city detective; was employed by Mr. Frank; saw Mr. Frank Monday afternoon, April 28th, at the factory. We went into Mr. Frank's private office. Mr. Frank said he had just come from police barracks and that Detective Black seemed to suspect him of the crime, and he then related to me his movements on Saturday, April 26th; that he arrived at the factory at 8 a. m., left between 9:30 and 10 with Mr. Darley for Montag Bros. for the mail; he returned at about 11 o'clock, and just before 12 o'clock Mrs. White came in and asked permission to go upstairs and see her husband; that Mary Phagan came into the factory at 12:10 p. m. to draw her pay; he paid her off in his inside office, and then she asked if the metal had come yet; replied he didn't know and that Mary Phagan then he thought reached the stairway, he heard voices; he could not distinguish whether they were men or girls talking, that about 12:50 he went up to the fourth floor and asked White and Denham when they would finish up their work and they replied they wouldn't finish up for

a couple of hours; Mrs. White was up there at the time and he informed her that he was going to lock up the factory, that she had better leave; Mrs. White preceded him down the stairway and went on out of the factory, but on the way out said she had seen a negro on the street floor of the building behind some boxes; that at 1:10 p. m. he left the factory for home; arrived at the factory again at 3 p. m., went to work on some financial work and at about 4 o'clock the night watchman reported for work, as per his instructions the previous day; that he allowed Newt Lee to go out and have a good time for a couple of hours and report again at 6 o'clock, which Newt did; that he left the factory at 6:04 p. m. and when he reached the street door found Lee talking to Gantt, an ex-bookkeeper who Frank had discharged for thieving; arrived home at about 6:25 p. m. and at 6:30 asked Lee over the telephone if Gantt had left the factory and if everything was all right, to which Lee replied "Yes;" that he went to bed around 9:30.

After that Mr. Frank and Mr. Darley accompanied me around the factory and showed me what the police had found. Mr. Frank seemed to be perfectly natural; saw no signs of nervousness. On Tuesday night, April 29th, Mr. Black told Mr. Frank that he believed Newt Lee was not telling all that he knew; we put them in a private room, they were together for about 10 minutes alone. When Mr. Black and I entered Lee hadn't finished his conversation with Frank and was saying, "Mr. Frank it is awful hard for me to remain handcuffed to this chair," and Frank hung his head the entire time the negro was talking to him, and finally in about thirty seconds, he said, "Well, they have got me too." After that we asked Mr. Frank if he had gotten anything out of the negro and he said, "No, Lee still sticks to his original story," Mr. Frank was extremely nervous at that time. He was very squirmy in his chair, crossing one leg after the other and didn't know where to put his hands; he was moving them up and down his face, and he hung his head a great deal of the time while the negro was talking to him. He breathed very heavily and took deep swallows, and sighed and hesitated. That interview between Lee and Frank took place shortly after midnight, Wednesday, April 30th. On Monday afternoon, Frank said to me that the first punch on Newt Lee's slip was 6:33 p. m., and his last punch was 3 a. m. Sunday. He didn't say anything at that time about there being any error in Lee's punches. Mr. Black and I took Mr. Frank into custody about 11:30 a. m., Tuesday, April 29th. His hands were quivering very much, he was very pale. On Saturday, May 3rd, went to Frank's cell with Black and asked him if from the time he arrived at the factory from Montag Bros. up until 12:50 p. m., the time he went upstairs to the fourth floor, was he inside of his office the entire time, and he stated "Yes." Then asked him if he was inside his office every minute from 12 o'clock until 12:30 and he said "Yes."

Cross-examined. Am not sure whether I got a statement about Mary Phagan being familar with

Gantt from Mr. Darley or Mr. Frank. Mr. Frank was present at the time. Mr. Frank told me when the little girl asked if the metal had come back that he said "I don't know." It may be true that I swore before the coroner that in answer to that question from Mary Phagan as to whether the metal had come yet that Frank said, "No," and it is possible that I so reported to you. If I said "No," I meant "I don't know."

Miss Monteen Stover. Worked at the National Pencil Company April 25th; was at the factory at 5 minutes after 12 on that day; left at 10 minutes after 12; went there to get my money; went in Mr. Frank's office; he was not there. I didn't see or hear anybody in the building. The door to the metal room was closed; had on tennis shoes, a yellow hat and a brown rain coat.

Cross-examined. Didn't notice the safe in Mr. Frank's office; walked right in and walked right out; am fourteen years old and I worked on the fourth floor; knew the paying-off time was 12 o'clock on Saturday and that is why I went there.

R. P. Barrett. Am a machinist for the National Pencil Company. On Monday morning between 6:30 and 7:00, April 28th, found some spots at the west end of the dressing room on the second floor of the factory. They were not there Friday. It was blood; looked like some white substance had been wiped over it. We kept potash and haskoline, both white substances, on this floor. I found some hair on the handle of a bench lathe; Mell Stanford saw this hair; the hair was not there on Friday. There was a pan of haskoline about 8 feet from where the blood was found.

Cross-examined. Never searched for any blood spots before, until Miss Jefferson came in and said she understood Mary had been murdered in the metal department, then I started to search right away; could tell it was blood by looking at it; can tell the difference between blood and other substances; found the hair some few minutes afterward—about 6 or 8 strands of hair and pretty long.

Mell Stanford. Work at the National Pencil Company; swept the whole floor in the metal room on April 25th. On Monday after found a spot that had some white haskoline over it on second floor near dressing room. That wasn't there on Friday when I swept. I use a small broom in sweeping. The spot looked like it was blood, with dark spots scattered around; looked like the large broom had been used in putting the haskoline on the floor.

Mrs. George W. Jefferson. Worked at the National Pencil Company; saw blood on the second floor in front of the girls' dressing room on Monday; about as big as a fan, and something white over it; didn't see that blood there Friday; there are cords in the polishing room, used to tie pencils with.

B. B. Haslett. Went to Mr. Frank's house Monday morning after the murder about 7 and took him to the station house.

E. F. Holloway. Am day watchman at the National Pencil factory—worked there two years; was there April 26th from 6: 30 a. m. till 11:45; look

after the elevator and freight that come in and out and people that come in and out. The elevator was locked Friday night when I left there; went off from there Saturday and forgot to lock it. Don't remember stating that I locked it Saturday; did say in an affidavit it is kept locked all the time. Left the factory at 11:45 on Saturday; about 9:30 Mr. Frank and Mr. Darley went over to Montag Bros.; have seen Gantt talking to Mary Phagan frequently.

Cross-examined. Never seen Mr. Frank speak to Mary Phagan.

To *Mr. Dorsey.* On May 12, 1913, I told you that the elevator was locked because I forgot to tell you I done some sawing; took the key out, left the elevator unlocked and took the key back and put it in the office.

N. V. Darley. Am manager of the Georgia Cedar Company, a branch of the National Pencil Company; was at the factory Saturday, April 26th; saw Mr. Frank. I was there Sunday morning at about 8:20; saw Mr. Frank; noticed his hands were trembling; observed that he seemed still nervous when he went to nail up the back door. He said that he had not had breakfast and didn't get any coffee and that they had rushed him by Bloomfields, carried him in a dark room and turned the light on and he saw the girl instantly and that was why he was nervous. Newt Lee seemed to be thoroughly composed. Heard him speak of the murder numerous times. When we started down the elevator Mr. Frank was nervous, shaking all over. I can't say positively as to whether his whole body was shaking or not, but he was shaking.

Don't think a day passed at the factory that Mr. Frank did not get nervous. When anything went wrong he would wring his hands and I have seen him push his hands through his hair. When things went wrong it would upset him. If anything out of the ordinary happened I have seen him a thousand times, I suppose, rub his hands. Never saw Mr. Frank speak to Mary Phagan; don't know whether he knew her or not; didn't know we had a girl by that name in the factory until I found it out afterwards.

W. F. Anderson. Was at police headquarters April 26th; got a call from the night watchman at the pencil factory that a woman was dead at the factory; asked him if it was a white woman or a negro woman. He said it was a white woman; went there and Newt Lee came down from the second floor. I called up Mr. Frank on the telephone at 3:30 or 4 and got no answer.

Cross-examined. Newt Lee was asked the following questions and gave the following answers at the coroner's jury: "Q. Had you ever seen him change that before? A. Well, he put the tape in once before. Q. When was that? A. I don't know, sir, when it was, it was one night. Q. How long did it take him the first time you ever saw him put the tape on? A. I never paid any attention to him. Q. Well, about how long did it take him, five minutes? A. No, sir, it didn't take him that long. Q. Did it take him a minute? A. I couldn't tell exactly how long. Q. How long did it take the other night, on Saturday night? A. Well, it took him a pretty good

little bit, because he spoke about it. He said it's pretty hard, you know to get on."

G. C. February. Was present at Chief Lanford's office when Leo M. Frank and L. Z. Rosser were there; took down Mr. Frank's statement stenographically. This (see *post*, p. 242), is a correct report of what Mr. Frank said. It was made Monday, April 28th.

Albert McKnight. My wife is Minola McKnight. She cooks for Mrs. Selig. Between 1 and 2 Memorial Day was at the home of Mr. Frank to see my wife. He came in close to 1:30. He did not eat any dinner; went to the sideboard of the dining room, stayed there 10 or 15 minutes and then he goes out and catches a car.

Cross-examined. Mrs. Selig and Mrs. Frank were present when Mr. Frank came in. I was in the cook room. You can see from the kitchen into the dining room. You can look in the mirror in the corner and see all over the dining room. I looked in the mirror in the corner and saw him; was never in the dining room in my life. Minola went into the dining room, and stayed a minute or two; don't know whether the other folks ate dinner or not. Told about Mr. Frank not eating after I came back to Birmingham, I told it to Mr. Craven of the Beck & Gregg Company. It was before Minola went down to the jail. Mr. Starnes, Mr. Campbell, Mr. Morse, Mr. Martin and Mr. Dorsey all talked to me; didn't see Mrs. Frank or Mrs. Selig that Saturday through the mirror; couldn't tell who was in the dining room without looking in the mirror.

Helen Ferguson. Worked at the National Pencil Company, Friday, 25th; saw Mr. Frank Friday, April 25th, and asked for Mary Phagan's money. Mr. Frank said, "I can't let you have it;" had gotten Mary's money before, but I didn't get it from Mr. Frank.

R. L. Waggoner. Am a city detective; was in the automobile with Mr. Frank and Mr. Black and his leg was shaking; he was under arrest at the time.

J. L. Beavers. Am chief of police of Atlanta; was at the pencil factory on Tuesday, April 29th; saw what I took to be a splotch of blood on the floor near this dressing room on office floor; there was one spot and some others scattered around that.

Cross-examined. Don't know whether it was blood or not; it looked like it.

R. M. Lassiter. I am a city policeman; on April 27th found a parasol in the bottom of the elevator shaft; it was lying about the center of the shaft; also found a ball of rope twine, small wrapping twine, and also something that looked like a person's stool.

Cross-examined. Noticed evidence of dragging from the elevator in the basement; the umbrella was not crushed.

L. O. Grice. Was at the National Pencil Company's place on Sunday morning, April 27th; defendant here, attracted my attention, on account of his nervousness.

Mell Stanford (re-called). The door in the rear part of the factory on the second floor on Friday evening was barred; the area around the elevator shaft on

the first floor was cleaned up after the murder.

W. H. Gheesling. Am a funeral director and embalmer; moved the body of Mary Phagan at four o'clock, April 27th, in the morning; the cord was around the neck; the rag was around her hair and over her face; think she had been dead ten or fifteen hours, or longer; there were some dry blood splotches on her underclothes; the right leg of the drawers was split with a knife or torn right up the seam; her right eye looked like it was hit before death, it was very much swollen; I found a wound two and a quarter inches on the back of the head; it was made before death, because it bled a great deal; the hair was matted with blood, and very dry; the skull wasn't crushed; the scalp was broken; can't state whether the defendant ever looked at the body or not.

Cross-examined. Mr. Rogers and Mr. Black came with Mr. Frank and askel me to take him back to where the girl was. I took them back there, and pulled a light, pulled the sheet back, and moved the revolving table and walked out between them. Mr. Frank was near the right-hand going in. Mr. Black was at the left. I prepared the little girl properly for burial; there was no mutilation at all on the body; judged she died of strangulation because the rope was tight enough to choke her to death, and her tongue being an inch and a quarter out of the mouth, showed she died from stranguation.

Dr. Claude Smith. Am physician and City Bacteriologist and Chemist; these chips the detectives brought to my office I examined; they had considerable dirt on them and some coloring stain; on one of them I found some blood corpuscles; do not know whether it was human blood; this shirt I examined and it showed blood stain; the blood on the chips was only four or five corpuscles.

Dr. J. W. Hurt. Am County Physician; saw the body of Mary Phagan on 27th of April; this cord was imbedded into the skin and in my opinion she died from strangulation; in my opinion the cord was put on before death; the wound on the back of the head seemed to have been made with a blunt-edged instrument, and the blow from down upward; the scalp wound was made before death; think the scratches on the face were made after death; examined the hymen; it was not intact; discovered no violence to the parts; the vagina was a little larger than the normal size of a girl of that age; it could have been produced by penetration immediately preceding death; she was not pregnant.

Cross-examined. The body looked as if it had been dragged through dirt and cinders; think she was dragged face downward. When I saw the body on April 27th I gave it as my opinion that she had been dead from 16 to 20 hours at 9 o'clock Sunday morning; have formed no opinion whether this little girl was raped or had ever had intercourse with anybody.

Dr. H. F. Harris. Am a practicing physician; made an examination of the body of Mary Phagan on May 5th; there was no actual break of the skull, the

blow was hard enough to have made the person unconscious, but not sufficient to have caused death; beyond question she came to her death from strangulation from this cord being wound around her neck. The bruise around the eye was caused by a soft instrument; the injury to the eye and scalp were caused before death; examined the contents of the stomach, finding 160 cubic centimeters of cabbage and biscuit, or wheaten bread; it had progressed very slightly towards digestion; impossible for one to say absolutely how long this cabbage had been in the stomach, but am confident she was either killed or received the blow on the back of the head within a half hour after she finished her meal; made an examination of the privates of Mary; found no spermatozoa. On the walls of the vagina there was evidences of violence; that injury had been made some little time before death; perhaps ten to fifteen minutes. It is my opinion that she lived from half to three-quarters of an hour after she ate her meal; that the child was strangled to death was indicated by the lividity, the blueness of the parts, the congestion of the tongue and mouth and the blueness of the hands and fingernails; the wound on the back of the head could not have been produced by this stick.

Cross-examined. It was impossible for any one to say absolutely how long the cabbage had been in the stomach of Mary Phagan before she met her death, not within a minute or five minutes, but I say it was somewhere between one-half an hour and three-quarters; am certain it was somewhere between one-half an hour and three-quarters; am certain of that. The violence to the private parts might have been produced by the finger or by other means.

C. B. Dalton. Know Leo M. Frank, Daisy Hopkins, and Jim Conley; have been in the office of Frank two or three times; have been down in the basement; saw Conley there and the night watchman, and he was not Conley. There would be some ladies in Mr. Frank's office. Sometimes there would be two, and sometimes one. Maybe they didn't work in the mornings and they would be there in the evenings.

Cross-examined. Have been down there one time this year, one Saturday evening with Miss Daisy Hopkins. Every time I was in Mr. Frank's office was before Christmas. Miss Daisy Hopkins introduced me to him; saw Conley there one time this year and several times on Saturday evenings; Conley was sitting there at the front door; when I went down the ladder Miss Daisy went with me; we went back by the trash pile in the basement; gave Jim Conley a half dozen or more quarters; saw Mr. Frank in his office in the day time. Mr. Frank had Coca-Cola, lemon and lime and beer in the office; never saw the ladies in his office doing any writing; am the Dalton that went to the chain-gang for stealing in Walton County in 1894; stole a shop hammer. It has been 18 or 20 years since I have been in trouble.

S. L. Rosser. Am a city policeman. On Monday, April 28, went out to see Mrs. White; on

May 6th or 7th was the first time I knew Mrs. White claimed to have seen a negro at the factory on April 26th.

James Conley. Have been working for the pencil company for over two years. Friday evening about 3 Mr. Frank came to the 4th floor and said I was to come to the factory Saturday morning at 8:30; got to the factory about 8:30; Mr. Frank and I got to the door at the same time. I always stayed on the first floor and watched for Mr. Frank while he and a young lady would be upon the second floor chatting. He always told me that when the lady came he would stamp on the floor and I was to lock the door and when he whistled was to open it. He says, "What I want you to do is to watch for me today as you did other Saturdays," and I says, All right. Went out and came back about noon. Then Mr. Frank says, "Now, there will be a young lady up here after awhile, and me and her are going to chat a little; now, when the lady comes, I will stomp like I did before, that will be the lady, and you go and shut the door; when I whistle I will be through, so you can go and unlock the door and you come upstairs to my office then like you were going to borrow some money for me and that will give the young lady time to get out." I says, All right, I will do just as you say, and I did as he said. He says, "Now, whatever you do, don't let Mr. Darley see you." Then Mr. Frank went upstairs and he said, "Remember to keep your eyes open," and I says, All right, I will, Mr. Frank. The first person I saw come along was a lady that worked on the fourth floor, don't know her name; the next person that came along was the negro drayman, he went upstairs. He was a peg-legged fellow, real dark; next I saw this negro and Mr. Holloway coming back down the steps. Mr. Darley came down and left, Mr. Holloway came down and left. This lady that worked on the fourth floor came down and left. The next person I saw coming there was Mr. Quinn; he went upstairs, stayed a little while and then came down; the next person that I saw was Miss Mary Perkins, that's what I call her, this lady that is dead; after she went upstairs I heard her footsteps going towards the office and after she went in the office, heard two people walking out of the office and going like they were coming down the steps, but they didn't come down the steps, they went back towards the metal department; after they went back there, heard the lady scream, then didn't hear no more, and the next person I saw coming in there was Miss Monteen Stover; she came back down the steps and left; heard somebody tiptoeing back towards the metal department; after that I kind of dozed off and went to sleep; next thing Mr. Frank was up over my head stamping and then I went and locked the door; next thing heard Mr. Frank whistling; went and unlocked the door just like he said, and went on up the steps. Mr. Frank was standing up at the top of the steps and shivering and trembling and rubbing his hands. He had a little rope in his hands; he asked me, "Did you see that little girl who passed here just

a while ago? she came into my office a while ago and I wanted to be with the little girl, and she refused me, and I struck her and I guess too hard and she fell and hit her head against something, and I don't know how bad she got hurt. Of course you know I ain't built like other men." Have seen him with women lying on the table in the factory room and in his office with women with their clothes up. He asked me to go back there and bring her up so that he could put her somewhere, and he said to hurry, that there would be money in it for me; came back there and found the lady lying flat on her back with a rope around her neck. The cloth was also tied around her neck and part of it was under her head like to catch blood; noticed the clock, it was four minutes to one; came back and told Mr. Frank the girl was dead and he said "Sh-Sh!" He told me to go back there by the cotton box, get a piece of cloth, put it around her and bring her up; saw her hat and a piece of ribbon laying down and her slippers and took them and put them all in the cloth; then I tried to carry her but she was heavy and I called to Mr. Frank to help me; he caught her by the feet and I laid hold of her by the shoulders. Then he got the key to the elevator and we took her to the basement where I left her; I opened the cloth and rolled her out on the floor. We both went up to his office; he looked out of the door and said, "My God, here is Emma Clarke and Corinthia Hall; come over here Jim;" he put me in the wardrobe and they came in there and I heard them go out, and Mr. Frank came and said, "You are in a tight place, you done very well;" he takes a cigarette and a match and hands me the box of cigarettes and I lit one; then he said, "Can you write?" and I said, Yes, sir, a little bit, and he takes his pencil to fix up some notes; was willing to do anything to help Mr. Frank because he was a white man and my superintendent, and he sat down and I sat down at the table and Mr. Frank dictated the notes to me; then he pulled out a little roll of greenbacks, and said, "Here is $200," I took the money. And after awhile Mr. Frank looked at me and said, "You go down there in the basement and you take a lot of trash and burn that package that's in front of the furnace," I told him all right. But I was afraid to go down there myself, and Mr. Frank wouldn't go down with me. He said, "There's no need of my going down there," and I said, Mr. Frank, you are a white man and you done it, and I am not going down there and burn that myself. He looked at me kind of frightened and said, "Let me see that money" and he took the money and put it back in his pocket, and said, "You keep your mouth shut, that is all right. Why should I hang? I have wealthy people in Brooklyn. I said, Mr. Frank what about me? and he said, "That's all right, don't worry, just come back to work Monday like you don't know anything, and keep your mouth shut, if you get caught I will get you out on bond and send you away. Can you come back this evening and do it?" I said, Yes, I was coming to get my money. He said,

"Well, I am going home to get dinner and you come back here in about forty minutes and I will fix the money." Went over to the beer saloon and took the cigarettes out of the box and there was some money there, two paper dollar bills and two silver quarters and I took a drink and laid across the bed and went to sleep; didn't get up until half-past 6 that night, that's the last I saw of Mr. Frank that Saturday; saw him next time on Tuesday on the fourth floor when I was sweeping. He said, "Now, remember, keep your mouth shut," and I said, All right, and he said, "If you'd come back on Saturday and done what I told you to do with it down there, there wouldn't have been no trouble." I was arrested on Thursday, May 1st, Mr. Frank told me just what to write on those notes there. That is the same pad he told me to write on. Met Mr. Frank Saturday morning, he had on his raincoat and his usual suit of clothes and an umbrella. Refused to write for the police the first time; told them I couldn't write.

Cross-examined. Am 27 years old; can't read and write good; can't read the newspapers good; can't get any sense out of them. There is some little letters like "dis" and "dat" that I can read; other things I don't understand; can spell "dog," and most simple little words like that; went to school about a year; can spell "day" but not "daylight;" can spell "beer" but not "whiskey;" can't figure except with my fingers; know the figures as far as twelve. Didn't know Newt Lee; heard them say there was a negro night watchman, but never did know that he was a negro. The lady that was with Mr. Frank the time I watched for him last July was Miss Daisy Hopkins. Mr. Frank called me in his office. He said, "You go down there and see nobody don't come up and you will have a chance to make some money." The other lady had gone out to get that young man, Mr. Dalton. She came back after a while with Mr. Dalton. They went downstairs and stayed about an hour. Mr. Dalton gave me a quarter, and the ladies came down and left, and then Mr. Frank came down after they left. The next Saturday I watched was right near the same thing. After Mr. Holloway left, Miss Daisy Hopkins came on into the office, Mr. Frank came out of the office, popped his fingers and went back into the office; went down and stood by the door. He stayed there that time about half an hour and then the girl went out. He gave me half a dollar this time. The next time I watched for him and Mr. Dalton, too, somewhere the last part of August. The lady that came in that day was one who worked on the fourth floor; it was not Miss Daisy Hopkins. She went right to Mr. Frank's office, then I went and watched. She stayed about half an hour and come out. Next time I watched was Thanksgiving Day; met Mr. Frank that morning about 8. He said, "A lady will be here in a little while, me and her are going to chat, I don't want you to do no work, I just want you to watch." In about half an hour the lady came. I didn't know her, she didn't work at the factory. She was very tall, heavy built lady. After she came down, she said to Mr.

Frank, "Is that the nigger?" and Mr. Frank said, "Yes," and she said, "Well, does he talk much?" and he says, "No, he is the best nigger I have ever seen." Mr. Frank called me in the office and gave me $1.25. Next time I watched was on a Saturday about the middle of January. A man and ladies came about half-past 2. They stayed there about 2 hours; didn't know either one of the ladies; can't describe what either one of them had on. The man was tall, slim built, a heavy man; have seen him at the factory talking to Holloway; he didn't work there; have been in prison three times since I have been with the pencil company. Seven or eight times within the last 4 or 5 years. Snowball and I drank beer together sometimes in the building. I never was drunk at the time Mr. Frank told me to watch for him. He talked to me before Snowball. There were eight niggers in all working in the factory. Snowball, the fireman and me did just plain manual labor, the rest of the negroes had better jobs. The time Mr. Frank told me about watching for him, he didn't know Snowball was in there. Snowball was standing right there by me. Miss Daisy Hopkins worked on the fourth floor in 1912. She was pretty, low, chunky kind of heavy weight. Looked to be about twenty-three. I was arrested on the 1st of May. Sent for Mr. Black to come down when I made my first statement on May 18. I denied I had been to the factory in that statement. Told Mr. Black on May 24, the time I made the second statement, that I helped tote the little girl; think I told them about Mr. Frank getting me to watch for him, that he told me he struck a girl and for me to go back and get her; didn't give Mr. Frank clear away that time; kept some things back. I told the detectives about wanting me to watch for him when I got back to the factory; don't know why I didn't tell them that at the time I told them about moving the body. I told the officers I didn't see Mary Phagan go up at all; didn't tell them I heard any scream; told Mr. Starnes and Mr. Campbell. That was after I got out of jail. I said I heard the scream before I went to sleep, which I did; told Mr. Starnes and Mr. Campbell about somebody running back on tiptoes; don't know why I didn't tell it the day I told them I was going to tell the whole truth; didn't mean to keep back anything then. That day I told them everything I remembered. When I got to the top of the stairs, Mr. Frank had that cord in his hands; don't remember when I first told about that. If I didn't tell it that day when I said I was telling the whole truth, I just didn't remember it. The reason why I didn't tell Scott and Black before I wrote four notes instead of two, they didn't ask me how many I wrote. I wrote three notes on white and one on green paper. The reason I didn't tell Scott and Black about burning the body, because some one had done taken them off the case. Did not see a man named Mincey on the electric car that day; did not tell how I had just killed a girl and did not want to kill another. Saw Mary Phagan's pocketbook, or mesh bag, in Mr. Frank's office after he got back

from the basement. It was lying on his desk. He put it in the safe.

Mrs. J. A. White (recalled). I have seen this man before at police headquarters (indicating Conley) about a month after the murder. At that time did not identify him as being the man I saw sitting on the box. The man sitting on the box was about the same size as Jim Conley; couldn't state it was Jim Conley.

C. W. Mangum. Had a conversation with Mr. Frank at the jail about seeing Conley and confronting him; told him the men were there with Conley and wanted to talk with him if he wanted to see them. He said, "No, my attorney is not here and I have nobody to defend me."

N. V. Darley (recalled). It was very dark around the elevator on the first floor on April 26th; never saw Jim Conley that day; never saw Mr. Frank talk to him or speak to him or come into contact with him in any way that day; was at the factory every Saturday afternoon; found Mr. Frank in his office on every occasion except one; saw Conley on Monday. He looked to be excited and when I spoke to him he failed to look up as he usually does; went around the factory that morning and looked at everybody to see if I could pick out a man that looked suspicious, and Jim Conley was the man I thought looked most suspicious. Have made no contribution toward the fund to defend Frank. If a body had been shot down the chute, behind those boxes, it would have been hidden more than where it was found; don't know anything about Conley being there Saturday afternoons and watching. He wasn't there by my instructions.

E. F. Holloway (recalled). Am the day watchman and time keeper; look after the register to see that everybody registers; it was not a habit of Conley to register or not as he pleased and to get his pay anyhow; never saw Mr. Frank goose, pinch or joke with Conley. He surely was a good hand at borrowing, but Mr. Frank would never let him have a nickel but what he owed him. Up till 12 months ago the sweepers stayed at the factory until about 2:30, but then they made a rule that any sweeping that wasn't done by noon on Saturday would have to go over until Monday and since that time no negroes have been there since 12 o'clock. We never had any negro night watchman in July, August, September, or any time last fall. We never had a negro night watchman until we hired Lee about three weeks before the murder. Was at the factory every Saturday since last June. Have never known Mr. Frank to have any woman on Saturdays excepting his wife. Mr. Schiff helped Mr. Frank on his books on Saturdays. Conley never did watch the door down stairs; never did see him giving signals to Mr. Frank and Frank giving him signals from upstairs; would have seen them if he had watched the door. There was nobody practicing any immoralities in the building. If they did I would know it. Daisy Hopkins quit some time in May or June last spring. She has never been there since she quit. On Monday morning saw Conley, instead of being upstairs where

he ought to be sweeping, down in the shipping room watching the detectives, officers and reporters; caught him washing his shirt. Looked like he tried to hide it from me.

Henry Scott (recalled). Was present when Conley made his statement May 18. I wrote that myself. He positively denied that he was at the factory on Saturday or that he knew anything about the murder. We tried for hours to get him to confess. The next statement he made on May 24, and we took him over to Mr. Dorsey's office, who went over it with him. He still denied seeing the little girl the day of the murder. On May 25 we talked to him five or six hours, showing him that Frank could not have written these notes on Friday. He still said he had told the truth. On May 28 he made another statement, the same as before. On May 29 he made his last statement. We told him what would fit and cussed him a good deal.

THE EVIDENCE FOR THE PRISONER

W. W. Matthews. Am a motorman; 26th April was running on English Avenue. Mary Phagan got on my car at Lindsey Street at 11:50. We got to Broad and Hunter about 12:10. Mary and some other little girl who was sitting with her, got off. The pencil factory is about a block and a half from Hunter and Broad. Nobody got on with Mary at Lindsey Street. Know the little Epps boy. He did not get on the car with her at Lindsey Street; saw Mary's body at the undertaker's. It was the same girl that got on my car.

W. T. Hollis. Am a street car conductor. On 26th April was on the English Avenue line. We ran on schedule that day. Mary Phagan got on at Lindsey Street at about 11:50. No one else got on with her. Epps did not get on with her; no one was sitting with her; do not recollect Epps getting on the car at all that morning.

Herbert G. Schiff. Am assistant superintendent of the National Pencil Co.; occupied the same office as Mr. Frank; the company's money except the petty cash was kept at the general manager's office, Mr. Sig Montag. All mail of the company is received there. Mr. Frank's salary was $150 a month. I usually leave the factory at 12:30 and return at 2 to 2:15. Frank would leave a little after 1 and return about 3; do not recall a single Saturday that Frank returned earlier than I did. We both worked together. The street doors were always open. Office boy would be in the outer office. Frequently we were interrupted by salesmen calling on us Saturday afternoon. The stenographers came back very seldom on Saturday afternoon; were liable to be interrupted at any time on Saturday afternoon by people on business. Newt Lee was the first negro night watchman we ever had. Frank and I usually left the factory at half-past 5 or a quarter to 6 on Saturdays; left together. Very often Mrs. Frank would come up to the office on Saturday; never saw Conley around the office on Saturday afternoon after 2

o'clock. We never had any women up in the office. Paid off the help on Friday, April 25th; remember paying Helen Ferguson that day. Nobody came up to ask for Mary Phagan's pay. We had posters all over the factory that Saturday would be a legal holiday and the factory would be closed; intended to come back to the factory Saturday morning, but overslept.

Cross-examined. Mr. Frank, when they telephoned him about the murder, asked had there been a fire at the factory; reason he was nervous, he said, he hadn't had any breakfast, he wanted a cup of coffee.

Joel C. Hunter. Am a public accountant. I have examined the financial sheet said to be made by Leo M. Frank; to find out how long it would take a person to make out these reports, I went through the calculations. I found them correct within a decimal. The quickest possible time to make out this report, balance the cash, make out the comparative statements and the copies of which they furnished me, is 150 minutes.

Cross-examined. A man's familiarity with a special class of work will aid materially in making it up. If he had had to get up the information which was furnished me it would take him a good deal longer than it did me, for the information was already furnished me; have allowed for his experience and familiarity with the business, in the way of saving time, in making my estimate; have tried to make my figures sufficiently conservative to make allowance for a man in charge of the work; think it will be wonderful to make it in less than that. A man who could make it out and verify it as he went along would take the whole afternoon.

C. E. Pollard. Am an expert accountant; was called in for the purpose of seeing the length of time it would take to gather these figures and get the result on the financial sheet and other papers that were furnished me. The minimum time that I could do that work in I found to be 3 hours and 11 minutes.

Hattie Hall. Am a stenographer for the National Pencil Company in the office of Montag Bros. Whenever it is necessary I go down to the National Pencil factory and do work there; saw Mr. Frank about 10, April 26th, at Montag Bros., when he asked me to come over and assist him at his office. I went over to the factory between 10:30 and 11. Several people came in while we were working, two men, one whose son worked there came in and spoke to Mr. Frank about the boy's being in some trouble in the police court. They went into the inner office to talk to him and he came out to the outer office with them. Miss Corinthia Hall and Mrs. White also came in there in Mr. Frank's office and I talked with him. These eight letters were dictated to me Saturday morning by Mr. Frank and I typewrote them there in the outer office. I did not see any little girl come along about that time.

Corinthia Hall. Work in the finishing up department of the pencil factory; am a forelady; was at the factory on April 26th; got there about 25 minutes to 12; Mrs. Freeman was with me; we went after her coat and to tele-

phone. It was about 15 minutes to 12 when we left the factory. Mr. Frank was writing when we came in his office. When we left the factory, the following people were still there: Arthur White, Mrs. White, May Barrett, her daughter, Harry Denham, the stenographer and Mr. Frank.

Cross-examined. We met Mr. Holloway as he came out of the factory as we went in. We met Lemmie Quinn afterwards at the Greek Cafe. It took us about 5 minutes to go there and come back to Greek Cafe. We got a cup of coffee and sandwich and were getting the change when Quinn came in.

Mrs. Emma Clarke Freeman. Worked at the pencil factory; on 26th reached the factory with Miss Hall about 25 minutes to 12; saw Mr. Frank at his office. He was talking to two men. Mrs. White and Mr. Frank's stenographer were also in the office; left about a quarter to 12; met Lemmie Quinn afterwards in a cafe. He said he had just been up to see Mr. Frank.

Miss Magnolia Kennedy. Am in the metal department; drew my pay Friday, April 25th, from Mr. Schiff at the pay window. Helen Ferguson was there when I went up there. Mr. Frank was not there, Mr. Schiff gave Helen Ferguson her pay envelope. Helen Ferguson did not ask Mr. Schiff for Mary Phagan's money.

Cross-examined. On Monday, Mr. Barrett called my attention to the hair which was found on the machine. It looked like Mary's hair.

Helen did not have any business going to Mr. Frank when Mr. Schiff was paying off. She did not go in and ask Mr. Frank for Mary's money; left with her. Mr. Frank was not paying off that day.

Wade Campbell. Work for the pencil factory; had a conversation with my sister, Mrs. Arthur White, on Monday, April 28th. She told me that she had seen a negro sitting at the elevator shaft when she went in the factory at 12 o'clock on Saturday and that she came out at 12:30, she heard low voices, but couldn't see anybody. On April 26th, got to the factory about 9:30. Mr. Frank was in his outer office. He was laughing and joking with people there, and joked with me. I have never seen Mr. Frank talk to Mary Phagan.

Lemmie Quinn. Am foreman of the metal department. The floor of the metal room is very dirty. You could not tell at the alleged blood spots whether they were varnish or oil. We have blood spots quite frequently when people get their hands cut; remember a man by the name of Gilbert was hurt in that room. He bled freely. About 8 months ago a boy cut his hand pretty badly and was carried by the ladies' dressing room to the main office, right over the place where Barrett found the blood spots. His hand was bleeding. About a hundred women work in the factory. Haskoline is scattered all over the floor of the metal room. That floor has never been scrubbed since I have been to the factory; could not tell what color hair it was Barrett found. There were only a half dozen strands in it. Chief Lanford took it. Last time I saw Mary Phagan before the murder was Monday. She left about 2 o'clock because

we were out of material and she was laid off for the rest of the week; have never seen Mr. Frank speak to her; went to the factory on April 26th, to see Mr. Schiff. He was not there. The street doors were open when I got there; did not see Mary Phagan nor Jim Conley, nor Monteen Stover. The doors to Mr. Frank's inner and outer office were open. The time I reached Mr. Frank's office was about 12:20. There was no blood spots under the machine where Barrett claims to have found the hair. There was no blood at the spot where Conley claims the body of the girl was found.

Harry Denham. Work on the fourth floor of the pencil factory. I was paid off Friday, April 25th; came back Saturday to do some work on the machinery when it was not running. We worked until 10 minutes after 3. It took a good deal of hammering; we were making a racket up there. May Barrett was the first person to come upstairs that day, about quarter past 11. Stayed about three-quarters of an hour. It was after 12 when she left. Mrs. Freeman and Miss Hall were the next to come upstairs and stayed about 15 minutes. Mrs. White came upstairs about 12:30 to see her husband. She had a good long talk with him. She was still upstairs when Mr. Frank came up. He told Mr. and Mrs. White that he was going to dinner and would like to close the doors. Mrs. White went right down behind Mr. Frank; never heard the elevator run that day; can see wheels turning on that floor. There were no noises in the factory that day, excepting street noises. When we came out we saw Mr. Frank at his desk in his office writing. Mr. White borrowed $2.00 from him. He did not look nervous or unusual. White and I on the fourth floor could have gone anywhere in the building that day. It was open to us.

Cross-examined. The first time Mr. Frank came upstairs it was about 10 minutes to 1. The second time was about 3 o'clock.

Minola McKnight. Work for Mrs. Selig. I cook for her. Mr. and Mrs. Frank live with Mr. and Mrs. Selig. His wife is Mrs. Selig's daughter; cooked breakfast for the family on April 26th. Mr. Frank finished breakfast a little after 7 o'clock. Mr. Frank came to dinner about 20 minutes after 1 that day. Mrs. Frank and Mrs. Selig were already eating when Mr. Frank came in. My husband, Albert McKnight, wasn't in the kitchen that day between 1 and 2 o'clock. Standing in the kitchen door you cannot see the mirror in the dining room. If you move where you can see the mirror, you can't see the dining room table. My husband wasn't there all that day. Mr. Frank left that day some time after 2 o'clock; next saw him at half-past 6 at supper. I left about 8 o'clock. Mr. Frank was still at home when I left. He took supper with the rest of the family. After this happened the detectives came out and arrested me and took me to Mr. Dorsey's office, where Mr. Dorsey, my husband and another man were there. They tried to get me to say that Mr. Frank would not allow his wife to sleep that night and that he told her to get up and get his gun and let him kill himself, and that he

made her get out of bed. They had my husband there to bulldoze me, claiming that I had told him that; had never told him anything of the kind; told them right there in Mr. Dorsey's office that it was a lie; they carried me down to the station house in the patrol wagon. They came to me for another statement about half-past 11 or 12 o'clock that night and made me sign something before they turned me loose, but it wasn't true. I signed it to get out of jail, because they said they would not let me out. It was all written out for me before they made me sign it.

Cross-examined. Signed that statement (see *post*, p. 244), but didn't tell you some of the things you got in there; didn't say he left home about 3 o'clock; said somewhere about 2. I did not say he was not there at 1 o'clock. Mr. Graves and Mr. Pickett, of Beck & Gregg Hardware Co., came down to see me. A detective took me to your (Mr. Dorsey's) office. My husband was there and told me that I had told him certain things. I denied it; wept and cried and stuck to it. That man there (Mr. Campbell) and a whole lot of men wanted me to tell lies. My husband tried, too. They made me sign that statement, but it was a lie. If Mr. Frank didn't eat any dinner that day I ain't sitting in this chair. Mrs. Selig never gave me no money. The statement that I signed is not the truth. They told me if I didn't sign it they were going to keep me locked up.

Emil Selig. Am Mr. Frank's father-in-law and live with him. The sideboard in the dining room is in the same position now, as it has always been. Mr. Frank on April 26th left the house before I breakfasted. I got back home to dinner about 1:15. Mr. Frank came in about 1:20. There was nothing unsual about him. No scratches or bruises about him. Noticed nothing unusual about him at supper. After supper Mr. Frank sat in the hall and read. A party of our friends came to the house and played cards after supper. Frank and his wife did not play. He came in one time while we were playing and said he read a story about a baseball umpire's decision and he was laughing.

Cross-examined. Have never seen the servants move that sideboard.

Mrs. Emil Selig. Am Mrs. Frank's mother. Mr. and Mrs. Frank have been living with us two years. The sideboard is in the same position it always has been except when we sweep under it. We had lunch on April 26th after 1 o'clock, about 10 minutes past 1. Mr. Frank came about 20 minutes past 1 while we were eating. He sat down with us and ate. Mrs. Frank and I left before he did, about half-past 1. He was still eating at the table. After the opera, while we were on the street car, saw Mr. Frank at 6:10. Mr. Frank was home when we got there; saw nothing unusual about him. No scratches, bruises, wounds or marks. We got home about half-past 6; sat down to supper about a quarter to 7. Mr. Frank ate with us; played cards that night in the dining room with a party of friends. He went to bed between 10 and 10.30; saw Mr. Frank next day about 11; saw no blood spots or marks

or bruises or cuts about him.

Cross-examined. Mr. Frank got home about 11 o'clock Sunday. He told us he had been sent for to come to town. He spoke of a crime having been committed; asked him what had happened; don't remember that he told me about the crime. He did not seem unconcerned about it. I said at coroner's that I thought he seemed unconcerned about it; don't remember his remarking about the youth of the girl or the brutality of the crime. Don't think Mr. Frank mentioned the name of the girl that was killed on Sunday.

Helen Kerns. At 10 minutes after 1 on April 26 saw Mr. Frank standing up against the building at the corner of Alabama and Broad Streets.

Mrs. A. P. Levy. Saw Mr. Frank get off a car on Memorial Day between 1 and 2 o'clock and cross the street to his home.

Mrs. M. G. Michael. Was visiting my sister, Mrs. Wolfsheimer; saw Mr. Frank about two o'clock on April 26th, going up Washington Street towards town. I was on the front porch when he came up and asked me about my people at home; noticed nothing unusual about him; no scratches or marks or any nervousness about him.

Jerome Michael. Saw Mr. Frank on April 26th between 5 minutes to 2 and 2; called him and when he saw my mother standing on the porch he came over and spoke to her; noticed absolutely nothing unusual about him. No scratches, bruises, marks and no nervousness.

Mrs. Hennie Wolfsheimer. Am the aunt of Mrs. Frank. On April 26th, I saw Mr. Frank in front of my house about 2 o'clock. I walked out on the porch after he came. I saw nothing unusual about him. No nervousness or bruises or scratches. I saw no stains on his clothes, no marks or tears of any kind.

Julian Loeb. Live across the street from the Wolfsheimer residence; am a cousin of Mrs. Frank; saw Mr. Frank on April 26th in front of the Wolfsheimer residence. It was between 1:50 and 2 o'clock.

Cohen Loeb. Was on the car with Mr. Frank going back to town on April 26th after lunch. That was about 2 o'clock. The car was blockaded by the crowd. There was nothing unusual about him. No marks, or scratches or spots on him. He had on a brown suit and a derby.

H. J. Hinchey. Saw Mr. Frank on April 26th opposite the main entrance to the Capitol. He was on the street car going to town. It was between 2 and 2:15.

Miss Rebecca Carson. Work at the National Pencil Co. on the fourth floor; am forelady of the sorting department; have from thirteen to fifteen girls under me; have heard the elevator running when the machinery in the factory was not running. On April 26th saw Mr. Frank looking at the parade in front of Rich's between 2:20 and 2:25. He spoke to me; saw him again at 10 minutes to 3 going into Jacob's Pharmacy. On Monday morning I said to Jim Conley, Where were you on Saturday? Were you in the factory? He said, "I was so drunk I don't know where I was or what I did." And Snowball, who was standing

there, said, "I can prove where I was."

Mrs. E. M. Carson. Worked at the pencil factory. Rebecca Carson is my daughter; have seen blood spots around the ladies' dressing room three or four times; saw Jim Conley on Tuesday after the murder. He was sweeping around my table, said, Well, Jim, they haven't got you yet, and he says, "No." I said, Jim, you know Mr. Frank never did that, and he says, "No, Mr. Frank is as innocent as you is, and I know you is."

Cross-examined. Have seen blood in the dressing room around the lockers and some around the mirror; have seen girls up there mash their fingers on the machines; have seen blood in the sink in the toilet room and on the machines; have seen spots about as big as my finger, different spots up on the fourth floor.

Miss Mary Pirk. Work at the National Pencil Co.; talked with Jim Conley Monday morning after the murder; accused him of the murder. He took his broom and walked right out of the office and I have never seen him since. His character for truth and for veracity is bad; would not believe him on oath.

Cross-examined. Suspected Jim because he looked and acted so different. Jim acted very peculiar. I mentioned it to several of the girls standing around, Miss Denham, Miss McCord, Mrs. Johns and several others; accused Jim before I saw the blood at the ladies' dressing room. It was all smeared. Mr. Frank is a perfect gentleman; always found him to be one in my dealings with him; have never heard any of the girls say anything about him; have never heard of a single thing immoral that he did do in those five years; have never heard of his going in the girls' dressing room. I have never heard of his slapping them as he would go by; have never heard Mr. Frank talk to Mary.

Mrs. Iora Small. Worked on the fourth floor of the pencil factory; saw Jim Conley on Tuesday. He was worrying me to get money from me to buy a newspaper and then he would come and ask me for copies of the paper before I would get through reading them. He told me Mr. Frank is just as innocent as I am and he says, "God knows I was noways around this factory on Saturday;" didn't see Mr. Frank talking to Jim anywhere in the factory on Tuesday; have never seen him talk to that nigger in my life; have known Conley for two years; general reputation for truth and veracity is bad; don't know of any nigger on earth that I would believe on oath.

Cross-examined. Did not see Mrs. Carson talk to Jim on Tuesday or Wednesday; saw Mr. Frank and Miss Carson talking on business between 8 and 9 o'clock on Tuesday. They stopped right in front of my machine. Mr. Frank went down stairs and Miss Carson went on back to her work.

Julia Fuss. Work on the fourth floor of the pencil factory; have never know anything wrong or immoral to be going on in Mr. Frank's office; talked with Jim Conley Wednesday morning after the murder. He was sweeping around there and asked me to see the newspaper.

As he read it he kinder grinned. He told me he believed Mr. Frank was just as innocent as the angels from Heaven. He was never known to tell the truth; would not believe him on oath.

Cross-examined. Have never heard Mr. Frank accused of any act of immorality or familiarity with the girls in the factory. Jim Conley got two papers from me on Tuesday and Wednesday. I bought them. Jim always seemed to be kind of nervous or half drunk or something. He aroused my suspicions after he began to read the papers and grin about them and comment on them.

Emma Beard. Am Mr. Schiff's servant. On April 26th somebody called Mr. Schiff on the telephone about half-past 10. It said, "Tell Mr. Schiff Mr. Frank wanted him at the office." The same voice called up Mr. Schiff again about 11 o'clock. I told him he would be there as soon as he could get dressed.

Annie Hixon. Am. Mrs. Ursenbach's servant. Mr. Frank called up on the telephone about half-past one on April 26th. "Tell Mr. Charlie I can't go to the ball game this afternoon."

J. C. Matthews. Was at Montag Bros. on April 26th; saw Mr. Frank in the office of Montag Bros., in the morning of that day.

Alonzo Mann. Am office boy at the National Pencil Company. I left the factory at half-past 11 on April 26th. When I left there Miss Hall, the stenographer from Montag's, was in the office with Mr. Frank; never saw him bring any women into the factory and drink with them; have never seen Dalton there. On April 26th, saw Holloway, Irby, McCrary and Darley at the factory; didn't see Quinn. I don't remember seeing Corintha Hall, Mrs. Freeman, Mrs. White, Graham, Tillander or Wade Campbell.

M. O. Nix. Am credit man for Montag Bros. and bookkeeper; have charge of the bookkeeping and documents and papers of the National Pencil Company; am familiar with Mr. Frank's handwriting. These financial sheets are in Mr. Frank's handwriting; so are these eleven requisition sheets; saw Mr. Frank on the morning of April 26th, at Montag's. He asked me to allow Miss Hattie Hall, my stenographer, to go over to the factory, to assist him as his stenographer was away.

Have never seen a letter written by Mr. Frank. The only writing of his that I am familar with are figures and things like pay rolls.

Harry Gottheimer. Am a traveling salesman for the National Pencil Company; Was at Montag Bros. at 10 o'clock on April 26th. Mr. Frank came in. I asked him about two orders and he replied that he couldn't tell, but that if I would return to the factory with him he would tell me, or if you can't come now, come this afternoon. Saw Frank in his office one Saturday afternoon in the early part of April about 3 o'clock. His wife was there doing some stenographic work for him. I am sure of that conversation. I had been in his office on previous Saturday afternoons. I never found any of the doors locked. He was always working.

Mrs. Rae Frank. Am the mother of Leo Frank; live in

Brooklyn. Mr. Moses Frank of Atlanta is my husband's brother; saw him at Hotel McAlpin in New York City on April 27th and April 28th. The letter you hand me (see *post*, p. 250) is my son's handwriting. The word "Yondef" in the letter is Hebrew, meaning "Holiday."

Cross-examined. Mr. Frank has no rich relatives in Brooklyn. My brother-in-law, Mr. Bennett, is a clerk at $18 a week. My son-in-law, Mr. Stearns, is in the retail cigar business. As to what my means of support are we have about $20,000 out at interest, my husband and I, at six per cent. We own the house we live in. We have a $6,000 mortgage on it. The house is worth about $10,000. My husband is doing nothing. He is not in good health. Up to a year ago he was a traveling salesman. These are the only relatives my son has in Brooklyn. Mr. Moses Frank, my brother-in-law, is supposed to be very wealthy. My husband is 67 years old. He is broken down from hard work and in very poor health.

Oscar Pappenheimer. Am a stockholder of the National Pencil Company; have been getting comparative sheets from Frank since March, 1910; have here the report for the week ending April 24, 1913. I got that on Monday morning, April 28th.

C. F. Ursenbach. Married a sister of Mrs. Leo Frank. On Saturday, about 20 minutes to 2, my cook told me that Mr. Frank had phoned and told me that he wasn't going to the game; saw him on Sunday, after the murder, at my house; saw no scratches, marks or bruises on him. He seemed to be a little disturbed in mind; saw him again that afternoon. He told us about the tragedy that evening. He gave me my rain coat, which he had borrowed previously.

Cross-examined. He and his wife and my wife and myself generally played cards Saturday evening. Mr. and Mrs. Selig's family usually played poker Saturday night. Mr. Frank borrowed my rain coat at 4:30 Sunday when it was raining, and I met him about 6 o'clock on Washington Street, and he returned it. He never had that rain coat until Sunday afternoon; am positive that he did not have it on Saturday.

Mrs. C. F. Ursenbach. Am Mrs. Leo Frank's sister. I saw no scratches, bruises, or marks on Mr. Frank on Sunday. He was nervous as one would have been under the circumstances. He borrowed a rain coat from my husband that afternoon. The rain coat was at our house on Saturday. Mr. Frank did not have it on Saturday.

Cross-examined. On Sunday Mr. Frank, when he was at the house, told us he had been called down town and that this little girl was murdered, and he told what a horrible crime it was; did not say who committed it; said nothing about employing a lawyer; said he had thought he heard the telephone ringing in his sleep, the night before; said when he saw the corpse it was a grewsome sight; said nothing about suspecting Newt Lee as being the guilty party; said he was sorry he let Gantt in the factory Saturday afternoon, because he mistrusted him, because he had not been honest; did not say he thought Newt Lee or Gantt had

committed the crime; said nothing about the clock having been improperly punched.

Mrs. A. E. Marcus. Am a sister of Mrs. Leo Frank; played cards Saturday night at Mrs. Selig's. Mr. Frank was there sitting out in the hall reading. Mr. Frank went to bed after 10 o'clock; noticed nothing unusual about him, no bruises, marks or signs.

Mrs. M. Marcus. Saw Mr. Frank at half-past 8 in the evening April 26th, at Mrs. Selig's residence. We played cards there. He stayed in the hall reading. He appeared as natural as usual.

M. J. Goldstein. Played cards Saturday night, April 26th, at Mrs. Selig's house; got there about 8:15; Mr. Frank was sitting in the hall; there was nothing unusual about him, no nervousness or anxiety.

Cross-examined. He came in while we were playing to tell us of some joke he had read, and we asked him to desist as it was distracting us from the game. Frank was reading a magazine which caused him considerable merriment and laughter.

I. Strauss. Was at the home of Mrs. Selig, Saturday night, playing cards; while we played he was sitting in the hall reading.

Mrs. Emil Selig (recalled). Deny categorically that any of the contents of Minola McKnight's affidavit are true; have never raised Minola's wages one penny since she has been with me.

Cross-examined. Didn't see Albert McKnight at my house on Saturday; Minola was paid $3.50 a week; advanced her a week's wages; the first week I gave her $5.00 and told her to give me the change. She brought $1.00 the next morning, and told me she kept 50 cents which I deducted the next week; think Mrs. Frank gave her a hat; Mrs. Frank has never given her any money to my knowledge.

Sigmund Montag. Am treasurer of the National Pencil Company; my office is two blocks from the pencil factory. Frank came to my office April 26th, about ten and stayed an hour; he talked to me, my stenographer, Miss Hattie Hall, and Mr. Gottheimer, one of the salesmen; went to the factory almost every Saturday afternoon; Mr. Frank would always be working at his desk on the financial sheet. Sunday morning was asked by phone if I could identify a girl that was killed in the basement of the pencil factory; referred him to Mr. Darley. After breakfast Mr. Frank came to my house; he was no more nervous than we were; saw no marks, scratches or discolorations of any sort on his face, and there were no spots on his clothing. Monday afternoon about three Mr. Schiff called me over the telephone and asked me if I would sanction the employment of the Pinkertons to ferret out this crime; told Mr. Schiff to go ahead.

Cross-examined. Mr. Frank when he was at my house Sunday morning had already been to the undertaker's; he told me they had taken him into a dark room and flashed on a light, and he said he saw the little girl there; he described how she looked; he said her face was scratched and her eye was dis-

colored, and she seemed to have a gash in her head; her mouth was full of sawdust and he described her in a general way; he did not say anything to me about an attorney or having been to police headquarters. I had not then employed counsel; my sending Mr. Herbert Haas to see Mr. Frank was not employing counsel; made no trade with Mr. Haas; don't know who is paying his fee; have not contributed anything towards it, nor has the Pencil Company.

Truman McCrary. Am a drayman; work for the National Pencil Company; would work on Saturday afternoons until half past three and sometimes as late as five; have never found the front door locked on a Saturday afternoon; have never seen Jim Conley watching there Saturday afternoon; have never seen him guarding the door; have never seen him around the factory at all Saturday afternoon; have never found the doors to Mr. Frank's inner or outer office locked; both doors have glass windows in them; anybody could see through them; have sometimes found Mr. Schiff working there with Mr. Frank on Saturday afternoon; did not see Jim Conley at the factory April 26th; did not tell him to go down in the elevator shaft and ease his bowels; went into Mr. Frank's office about twelve o'clock on April 26th; Mr. Frank was there.

D. J. Nix. Was office boy at the pencil factory; on Saturday afternoons, Mr. Frank and Mr. Schiff would be there working; would stay in the outer office; never left the factory on Saturday afternoon; have never known Mr. Frank to have any women in his office drinking or doing anything else.

Frank Payne. Was office boy last Thanksgiving day at the pencil factory; Mr. Schiff and Mr. Frank were working there in the office that day. Have never known him to have any women in there, or see any drinking going on.

Phillip Chambers. December 12, 1912, was office boy at the pencil factory until March 29, 1913; stayed in the outer office; on Saturdays I stayed until 4:30 and sometimes until 5 o'clock; Mr. Frank never did have any women in there; never saw any drinking there; never seen Dalton come in there; have seen Jim Conley sweeping there Saturday afternoon; Snowball would be in there once in a while; never known the front door to be locked Saturday afternoon; never seen anybody watching the door on any Saturday; have seen Mr. Frank's wife come to his office; Mr. Schiff would be helping him some of the Saturdays; never seen Mr. Frank familiar with any of the women in the factory; never seen him talk to Mary Phagan.

Godfrey Weinkauf. Am superintendent of the Pencil Company's lead plant; visited the office of the factory every other Saturday, between 3 and 5 o'clock; would find Mr. Holloway, Mr. Frank and Mr. Schiff there; never saw any women in the office there; never saw Jim Conley there Saturday afternoons.

Charlie Lee. Am a machinist at the pencil factory; Duffy's finger was hurt on the eyelet machine October 4, 1912; the blood

spouted out; there was a lot of the blood on the floor.

Cross-examined. Duffy was hurt in the metal room on the machine opposite Mary Phagan's machine; the pencil company took a written statement from me, signed by me, to keep the fellow from suing the company; saw my signature this morning; have never told you I signed that statement.

Arthur Pride. Worked on the second floor of the factory; on Saturdays I work all over the factory, doing anything that is necessary, until about half past four; have never seen any women come up there and see Mr. Frank, or any drinking going on there, or seen Jim Conley sitting and watching the door; Jim Conley's general character for truth and veracity, it is bad; would not believe him on oath.

Cross-examined. No, I ain't a high-class, nigger, but I am a different grade from him.

Daisy Hopkins. Am a married woman; worked in the factory; Mr. Frank never spoke to me when he would pass; never did speak to him; never been in his office drinking beer, coca-cola, or anything else; know Dalton; never visited the factory with him; never have been to the factory on Saturday; never introduced him to Mr. Frank; there isn't a word of truth in that; have never gone down in the basement with Dalton.

Cross-examined. Mr. Smith got me out of jail. Somebody told a tale on me, that's why I was put in jail; they accused me of fornication; never was tried.

Laura Atkinson. Have been in Mr. Dalton's company three times; never met him at the Busy Bee Cafe; have never walked with him to or from the pencil company.

Mrs. Minnie Smith. Work at the pencil factory; never met Dalton or walked home with him; don't know him; know Mr. Frank; have spoken to him six times in the four years I worked there.

V. S. Cooper, W. T. Mitchell, O. A. Nix, Samuel Craig, B. L. Patterson, Robert Craig, Ed Craig, T. L. Ambrose, J. P. Bird, J. H. Patrick and *I. M. Hamilton* testified that they lived in Gwinnett or Walton county; that they used to know C. B. Dalton before he left Monroe in Walton county; that his general character for truth and veracity is bad, and that they would not believe him on oath.

R. L. Bauer. Summers of 1909-1910, I worked at the National Pencil Co. Saturdays; since have worked off and on at the factory on Saturdays; was up at the office on the Saturday afternoon before Mr. Schiff went away; Mr. Holloway, Mr. Schiff, Mr. Frank and the office boy were there; never seen any women in Mr. Frank's office on Saturdays.

Cross-examined. Have always found Mr. Schiff there on Saturday afternoons, except when he was off on his trip; saw Mr. Frank in his office on the fourth Saturday in January.

Gordon Bailey. Work at the factory; am called "Snowball"; never saw Jim Conley talk to Mr. Frank Friday before the murder; have never heard Mr. Frank ask Conley to come back on any Saturday; never seen

Mr. Frank bring any women into the factory; never seen Jim Conley guarding or watching the door; have seen Jim take newspapers and look at it, but don't know if he read them or not.

Henry Smith. Work at the pencil factory in the metal department with Barrett; he talked to me about the reward; said it was $4,300, and he thought if anybody got it, he ought, for he found the blood and hair; said he ought to get the first hook at it.

Milton Klein. Saw Mr. Frank last Thanksgiving evening at a dance given by the B'nai B'rith at the Hebrew Orphans' Home. Mr. Frank helped Mr. Coplan and myself give the dance; we were the committee in charge.

Cross-examined. Was at the jail to see Mr. Frank when the detectives brought Conley down there; sent word down that Mr. Frank didn't care to see Conley; Mr. Frank said that he would see Conley only with the consent of his attorney, Mr. Rosser; Mr. Frank looked very much disappointed because the grand jury had just indicted him when he had expected to be cleared. Mr. Frank has a great many friends who constantly visited him in jail.

Nathan Coplan. Remember last Thanksgiving Day was a very disagreeable one; The B'nai B'rith gave a dance; Mr. Frank had charge of it; Mr. Frank and his wife were there.

Joe Stelker. Have got charge of the varnishing department at the pencil factory; saw the spot that Mr. Barrett claimed he had found in front of the young ladies' dressing room; it looked like some one had some coloring in a bottle and splashed it on the floor; saw the white stuff on it; it looked like a composition they use on the eyelet machine or face powder; the alleged blood spots could have been made with a transparent red varnish. Jim Conley's character for truth and veracity is very bad; would not believe him on oath.

Harlee Branch. Work for the Atlanta Journal; on May 31st Jim Conley told me he didn't see the purse of this little girl; said it took him thirty-five minutes after going upstairs until he left the factory; was at the jail where the detectives were making him go through his story. It took him nearly fifty minutes to go through the motions. He said he finished about 1:30 and then went out; that Lemmie Quinn got into the factory about 12 and remained about 8 or 9 minutes.

John M. Minar. Am a newspaper reporter; visited George Epps Sunday night, April 27th; he said he knew the girl, that he had ridden to town with her in the mornings occasionally when she went to work. He said nothing as to having seen the girl on Saturday and coming in on the car with her.

W. D. McWorth. Am a Pinkerton detective; worked on the Frank case; found near the front door on the ground floor, stains that might or might not have been blood. All the radiators in the factory had trash, dirt and rubbish behind them; sticking my hand around the dust and dirt, discovered a pay envelope also a club; the stains on the club were either paint or blood.

John Finley. Was formerly master machinist and assistant

superintendent of the pencil factory. Mr. Frank's character was good.

A. D. Greenfield. I am one of the owners of the building occupied by the Pencil Company. I have known Mr. Frank four or five years. His character is good.

Dr. Wm. Owens. Am a physician; at the request of the defense went through certain experiments in the pencil factory to ascertain how long it would take to go through Jim Conley's movements relative to moving the body of Mary Phagan; kept the time while the other men were going through with the performance. Mr. Wilson of the Atlanta Baggage Co. also kept time with me. Mr. Brent and Mr. Fleming enacted the performance. It took us eighteen and a half minutes to go through the movements and conversation which Conley says took place between him and Frank on Saturday, April 26th; the eighteen and a half minutes did not include the eight minutes that Conley said he was in the wardrobe and also the time it took him to write the notes. Including that the whole performance would have taken 36½ minutes.

Cross-examined. Yes, I wrote that letter at the instance of myself and of Mr. Leonard Haas, my attorney, as a matter of conscience. It is partly as follows: "To the Grand Jury of Fulton County, W. D. Beattie, foreman. Gentlemen: Among a number of people with whom I have discussed the unfortunate Phagan affair, I have found very few who now believe in the guilt of Leo M. Frank, and I have felt a deep conviction growing in my heart that a terrible injustice might be inflicted upon an innocent man."

Isaac Haas. Know Leo M. Frank; his character is very good.

A. N. Anderson. Am clerk at Atlanta Bank. The pass book of Leo M. Frank shows a balance to his credit of $16 on April 18, don't know that that's the only bank account that he had.

R. P. Butler. Am the shipping clerk for the Pencil Company; the doors leading into the metal room are wooden doors with glass windows; there is no trouble looking through them into the metal room, even when the doors are closed.

I. U. Kauffman. Made a drawing of the Selig residence on Georgia avenue, in this city. Standing in the back door of the kitchen room against the north side of the door, I could not see that mirror, because of the partition between the passageway and the dining room.

J. Q. Adams. Am a photographer; took photographs of the Selig home from the inside; one photograph was taken standing directly in the door; you could not see the mirror with the naked eye or in the picture; took views also of the pencil factory; standing in the door you could not see any part of Mr. Frank's desk, or a telephone or a window.

Prof. Geo. Bachman. Am professor of physiology and physiological chemistry. Bomar says it takes four hours and a half to digest cabbage. If the cabbage is not well chewed it would take considerably longer.

Dr. Thomas Hancock. Have practiced for twenty-two years;

engaged in hospital work six or seven years; have treated about 14,000 cases of surgery; have examined the private parts of Leo M. Frank and found nothing abnormal; he is a normal man, sexually. Neither I nor anybody else could give an intelligent opinion of how long that cabbage and wheat bread had been in the stomach before death. Finding the epithelium missing in several places or separated from the wall of the vagina would not indicate any violence done to the subject in life. The condition of the blood vessels as described I would expect to result from other causes than violence. Even if violence caused them, you could not tell how long before death that violence had been inflicted, or that it had been inflicted within from five to fifteen minutes before death.

Dr. Willis F. Westmoreland. Am a practicing physician for twenty-eight years, general practice and surgery. A professor of surgery for twenty years, and formerly president of the State Board of Health. From the evidence I have heard it would be impossible to tell whether or not that would have produced unconsciousness before death; skull may be fractured without producing unconsciousness; death may be produced by a blow on the head that leaves very little outward signs. From looking at such a wound without any knowledge of the amount of blood lost, one could not tell whether it was inflicted before or after death; one could not tell from looking at a wound of that sort from which direction it was inflicted. Have no personal feeling against Dr. Harris; preferred charges with State Board of Health charging Dr. Harris with professional dishonsety. It would be impossible to form a reliable opinion that cabbage and bread had been in that stomach before death, on that data or any other data, that could be found by looking at the stomach nine or ten days after death. Many things retard digestion. Much depends upon the particular stomach and its affinity for particular foods. Food that is not thoroughly emulsified will remain in the stomach indefinitely. Cabbage like that, and wheat bread, might remain in the stomach until the process of digestion is complete, which ordinarily would be from three and a half to four hours. Any epithelium can be very easily stripped after death. The digital examination could have stripped it. So could the removal for purposes of post mortem examination. If the subject had had a menstrual period a day or two before death and she was found in the act of menstruating at the time of death, this would account for the congested blood vessels, and it would also make the epithelium much easier to strip. Even if an opinion could be expressed as to violence before death, it would be impossible to say that it occurred from five to fifteen minutes before death. From an examination of the private parts of Leo M. Frank he appears to be a perfectly normal man. A black eye could be inflicted after death.

Cross-examined. There are sexual inverts who are absolutely normal in physical appearance. A doctor could not look at cabbage in various stages of diges-

tion and venture an opinion as to how long it had been in a woman's stomach. The human tongue could not produce any signs of violence in the vagina.

Dr. J. C. Olmstead. Practicing physician for 36 years. Given the facts on this case it would not be possible for a physician to determine whether or not that wound produced unconsciousness before death. Such a wound could have been made within a short while after death. Cabbage like that is liable to obstruct the opening of the pyloris and to delay digestion. That a microscope shows on parts of the vagina removed from the body that the blood vessels are congested may be due to menstruation or the natural gravitation of blood to those parts and is not necessarily indicative of violence. The use of embalming fluid would make a diagnosis of violence utterly unreliable. It would be impossible for a doctor finding those conditions in the vagina by means of a microscope 9 or 10 days after death to tell that violence had been inflicted from 5 to 15 minutes before death.

Dr. W. S. Kendrick. Have been a practicing physician for 35 years. Don't think that the finding of the epithelium stripped from the wall would indicate anything unusual; don't think that would indicate any act of violence. A female's menstrual periods brings about congestion and hemorrhages of the blood vessels every time. The body described nine or ten days after death one could have no way of telling whether that wound would produce unconsciousness or not; would be a pure conjecture. Skulls are sometimes fractured without unconsciousness. Some stomachs will digest different substances quicker that others; don't think there is an expert in the world who could form any definite idea by either chemical analysis of the liquids of the stomach or by the condition of the cabbage lodged in the stomach as to how long it had been in the stomach.

John Ashley Jones. Have known Mr. Frank a year; his general character is good; am resident agent for the New York Life Insurance Company; have never heard any talk of Mr. Frank's practices and relations with the girls down there. Mr. Frank has a policy of insurance with us. It is our custom to seek a very thorough report on the moral hazard on all risks. The report on him showed up first class, physically as well as morally; have never seen any nude pictures hanging in his office, although I have been there a number of times; have never heard that he smiled and winked at young girls.

Dr. Leroy Childs. Am a surgeon; cabbage is the hardest food to digest among carbohydrates, because it has so much cellulose which is a woody fibre. Cabbage gets its digestion in the mouth. That cabbage has not been masticated thoroughly. They have been swallowed almost whole. Raw cabbage is easier digested than cooked cabbage. The shortest time for boiled cabbage to pass into the small intestines is 4 and a half hours after it is eaten. The stomach does not digest the cabbage. Physic influences will retard digestion as excitement, fear, anger, also physical or mental exercise. If a human body is

disinterred at the end of 9 days and the stomach is taken out and among the contents you find cabbage like that and fragments of wheat bread slightly digested, you could not by looking at the cabbage hazard an opinion as to how long before death that had been taken into the stomach.

Alfred Loring Lane. Am a resident of Brooklyn, N. Y. Knew Leo Frank 4 years at Pratt Institute which we both attended. His general character is good.

Philip Nash. Knew Leo Frank 4 years at Pratt Institute. His general character is good.

Richard A. Wright. Live in Brooklyn, N. Y. Knew Leo Frank 4 years at Pratt Institute, also 3 years at Cornell. His general character is good.

Harry Lewis. Live in Brooklyn, N. Y.; am a lawyer; have known Leo Frank about 12 years; have been a neighbor of his until he came South. His general character is good.

Herbert Lasher. Knew Leo Frank at Cornell University; was in his class, and we roomed together for 2 years. His general character was very good.

John W. Todd, Prof. C. D. Albert, Prof. J. E. Vanderhoff, V. H. Kriegshaber, M. F. Goldstein, Dr. David Marx, Jewish Rabbi, and *R. A. Sonn,* Superintendent of the Hebrew Orphans' Home, testified that his character was good.

Arthur Heyman, Mrs. H. Glogowski, Mrs. Adolph Montag, Mrs. J. O. Parmelee, Ida Hays, Eula May Flowers, Opie Dickerson testified to the same effect.

Mrs. Emma Clark Freeman. Have worked at the pencil factory over 4 years. Mr. Frank's general character is good; am a married woman; have known Conley ever since he has been at the factory. His general character for truth and veracity is bad; would not believe him on oath.

Cross-examined. Have never heard any suggestion of any wrongdoing on the part of Mr. Frank, either in or out of the factory; was forelady at the factory for about 3 years.

Sarah Barnes. Worked at the pencil factory over 4 years; his character is good. He has been the best of men.

Irene Jackson. Worked at the pencil factory for 3 years. Mr. Frank's character was very well. He never said anything to me; never met Mr. Frank at any time for any immoral purpose.

Cross-examined. The girls seemed to be afraid of him; heard some remarks two or three times about Mr. Frank's going to the dressing room on different occasions; never heard any talk about Mr. Frank going around putting his hands on girls; never heard of his going out with any of the girls.

Miss Bessie Fleming. Worked as stenographer for Mr. Frank; his character was unusually good.

Cross-examined. Am just talking about my personal relations with him; have never seen him do anything wrong there in the factory. He never made any advances to me or anyone else.

Mrs. Mattie Thompson. Work at the pencil factory. Mr. Frank's character is good. I have never heard anything against him; have never met Mr. Frank anywhere or at any time for any immoral purpose.

Miss Irene Carson. Worked

at the pencil factory; have never met Mr. Frank at any time or place for any immoral purpose.

Mrs. J. J. Wardlaw. Worked at the pencil factory; Mr. Frank's character is good; have never heard of any improper relation of Mr. Frank with any of the girls at the factory. I have never heard of his putting his arm around any girls on the street car, or going to the woods with them.

THE PRISONER'S STATEMENT.

Leo M. Frank. Gentlemen of the jury: In the year 1884, on the 17th day of April, I was born in Quero, Texas. At the age of three months, my parents took me to Brooklyn, New York, and I remained in my home until I came South, to Atlanta, to make my home here. I attended the public schools of Brooklyn, and prepared for college, in Pratt Institute, Brooklyn, New York. In the fall of 1902, I entered Cornell University, where I took the course in mechanical engineering, and graduated after four years, in June, 1906. I then accepted a position as draftsman with the B. F. Sturtevant Company, of Hyde Park, Massachusetts. After remaining with this firm about six months, I returned once more to my home in Brooklyn, where I accepted a position as testing engineer and draftsman with the National Meter Company of Brooklyn, New York. I remained in this position until about the middle of October, 1907, when, at the invitation of some citizens of Atlanta, I came South to confer with them in reference to the starting and operation of a pencil factory, to be located in Atlanta. After remaining here for about two weeks, I returned once more to New York, where I engaged passage and went to Europe. I remained in Europe nine months. During my sojourn abroad, I studied the pencil business, and looked after the erection and testing of the machinery which had been previously contracted for. The first part of August, 1908, I returned once more to America, and immediately came South to Atlanta, which has remained my home ever since. I married in Atlanta, an Atlanta girl, Miss Lucile Selig. The major portion of my married life has been spent at the home of my parents in law, Mr. and Mrs. Selig, at 68 East Georgia Avenue. My married life has been exceptionally happy—indeed, it has been the happiest days of my life. My duties as superintendent of the National Pencil Company were in general as follows: I had charge of the technical and mechanical end of the factory, looking after the operations and seeing that the product was turned out in quality equal to the standard which is set by our competitors. I looked after the installation of new machinery and the purchase of new machinery. In addition to that, I had charge of the office work at the Forsyth Street plant, and general supervision of the lead plant, which is situated on Bell Street. I looked after the purchase of the raw materials which are used in the manufacture of pencils, kept up with the market of those materials, where the prices fluctuated, so that the purchases could be made to the best possible advantage. (After describing what he did on Friday.) On Sat-

urday, April 26th, arrived at the factory at about 8:30 a. m. I found Mr. Holloway, the day watchman, at his usual place and Alonzo Mann, the office boy, in the outer office. (After describing at length the work he did in his office that morning.)

About 9 o'clock Mr. Darley and Mr. Wade Campbell, the inspector of the factory, came into the outer office, and I stopped what work I was doing that day on this work, and went to the outer office and chatted with Mr. Darley and Mr. Campbell for 10 or 15 minutes, and conversed with them, and joked with them, and while I was talking to them, about 9:15, Miss Mattie Smith came in and asked me for her pay envelope, and for that of her sister-in-law, and I went to the safe and unlocked it and got out the package of envelopes that Mr. Schiff had given me the evening before, and gave her the required two envelopes, and placed the remaining envelopes that I got out, that were left over from the day previous, in my cash box, where I would have them handy in case others might come in. I continued to work on those invoices, when I was interrupted by Mr. Lyons, Superintendent of Montag Brothers. I told him if he would wait for a minute I would go over to Montag Brothers with him, as I was going over there; and he stepped out to the outer office, and as soon as I come to a convenient stopping place in the work, I put the papers I had made out to take with me in a folder, and put on my hat and coat and went to the outer office, when I found that Mr. Lyons had already left. Mr. Darley left with me about 9:35 or 9:40, and we passed out of the factory, and stopped at the corner of Hunter and Forsyth Streets, where we each had a drink at Cruickshank's soda water fount, where I bought a package of Favorite cigarettes, and after we had our drink I lighted a cigarette and went on my way to Montag Brothers, where I arrived at 10 o'clock. Chatted with Mr. Montag, and spoke to Mr. Matthews, and Mr. Cross, of the Montag Brothers, and to Miss Hattie Hall, the Pencil Company's stenographer, and asked her to come over and help me that morning; that I had enough work to keep her busy that whole afternoon, but she said she didn't want to do that, she wanted to have at least half a holiday on Memorial Day. I then spoke to several of the Montag Brothers' force on business matters and other matters, and after that I saw Harry Gottheimer, the sales manager of the National Pencil Company, and I spoke at some length with him in reference to several of his orders that were in work at the factory, there were two of his orders especially that he laid special stress on, as he said he desired to ship them right away. Returned to the factory alone. On arrival there I went to second or office floor, and I noticed the clock, it indicated 5 minutes after 11. I saw Mr. Holloway there, and I told him he could go as soon as he got ready, and he told me he had some work to do for Harry Denham and Arthur White, who were doing some repair work up on the top floor, and he would do the work first. I then went into the office and found Miss Hattie Hall, who had preceded me over from Montag's, and another lady who introduced herself to me as Mrs. Arthur White, and the

office boy; Mrs. Arthur White wanted to see her husband. I told Alonzo Mann, the office boy, to call up Mr. Schiff, and find out when he was coming down. The answer was that Mr. Schiff would be right down. About this time Mrs. Emma Clarke Freeman and Miss Corinthia Hall, two of the girls who worked on the fourth floor, came in, and asked permission to go upstairs and get Mrs. Freeman's coat, which I readily gave, and I told them at the same time to tell Arthur White that his wife was downstairs. A short time after, two gentlemen came in, one of them a Mr. Graham, and the other the father of a boy by the name of Earle Burdette; these two boys had gotten into some sort of trouble during the noon recess the day before, and were taken down to police headquarters, and of course didn't get their envelopes the night before, and I gave the required pay envelopes to the two fathers, and chatted with them at some length in reference to the trouble their boys had gotten into the day previous. Just before they left the office, Mrs. Emma Freeman and Miss Corinthia Hall came into my office and asked permission to use the telephone. Miss Clark and Miss Hall left the office, as near as may be, at a quarter to 12, and went out, and I started to work reading over the letters and signing the mail and transacting orders.

There were in the building then Arthur White and Harry Denham and Arthur White's wife on the top floor. From 10 to 15 minutes after Miss Hall left my office, this little girl, whom I afterwards found to be Mary Phagan, entered my office and asked for her pay envelope. I asked for her number and she told me; I went to the cash box and took her envelope out and handed it to her, identifying the envelope by the number. She left my office and apparently had gotten as far as the door from my office leading to the outer office, when she evidently stopped and asked me if the metal had arrived, and I told her no. She continued on her way out, and I heard the sound of her footsteps as she went away. It was a few moments after she asked me this question that I had an impression of a female voice saying something; I don't know which way it came from; just passed away and I had that impression. This little girl had evidently worked in the metal department by her question and had been laid off owing to the fact that some metal that had been ordered had not arrived at the factory; hence, her question. I only recognized this little girl from having seen her around the plant and did not know her name, simply identifying her envelope from her having called her number to me.

She had left the plant hardly five minutes when Lemmie Quinn, the foreman of the plant, came in and told me that I could not keep him away from the factory, even though it was a holiday; at which I smiled and kept on working. He asked me if Mr. Schiff had come down and I told him he had not and he turned around and left. I continued work until I finished this work and these requisitions and I looked at my watch and noticed that it was a quarter to 1. I called my home up on the telephone, for I knew that my wife and my mother-in-law were going to a matinee and I

wanted to know when they would have lunch. Minola answered the phone that they would have lunch immediately and for me to come right on home. I gathered my papers together and went upstairs to see the boys on the top floor. I saw Arthur White and Harry Denham who had been working up there and Mr. White's wife. I asked them if they were ready to go and they said they had enough work to keep them several hours. I noticed that they had laid out some work and I had to see what work they had done and were going to do. I asked Mr. White's wife if she was going or would stay there as I would be obliged to lock up the factory, and Mrs. White said, no, she would go then. I went down and gathered up my papers and locked my desk and went around and washed my hands and put on my hat and coat and locked the inner door to my office and locked the doors to the street and started to go home.

Now, gentlemen, to the best of my recollection from the time the whistle blew for 12 o'clock until after a quarter to 1 when I went up stairs and spoke to Arthur White and Harry Denham, to the best of my recollection, I did not stir out of the inner office; but it is possible that in order to answer a call of nature or to urinate I may have gone to the toilet. Those are things that a man does unconsciously and cannot tell how many times nor when he does it. Now, sitting in my office at my desk, it is impossible for me to see out into the outer hall when the safe door is open, as it was that morning, and not only is it impossible for me to see out, but it is impossible for people to see in and see me there.

Arrived home about 1:20. I found that my wife and my mother-in-law were eating their dinner, and my father-in-law had just sat down and started his dinner. Called up my brother-in-law to tell him that on account of some work I had to do at the factory, I would be unable to go with him, he having invited me to go with him out to the ball game. After a few minutes my wife and mother-in-law finished their dinner and left and told me good-bye. My father-in-law and myself continued eating our dinner, Minola McKnight serving us. After finishing dinner, I lighted a cigarette and laid down. After a few minutes I got up and walked up Georgia Avenue to get a car. I saw the Washington Street car coming and I ran up and got on the car and talked to Mr. Loeb on the way to town. About the intersection of Washington Street and Hunter Street and the fire engine house there was a couple of cars stalled up ahead of us, the cars were waiting there to see the memorial parade. After it stood there a few minutes, I told Mr. Loeb that I was going to get out and go on as I had work to do. I went on down Hunter Street, when I got down to the corner of Whitehall and Hunter, the parade had started to come around and I had to stay there 15 or 20 minutes and see the parade. I stood there between half-past 2 and a few minutes to 3 o'clock until the parade passed; then I went on down to Jacobs and purchased twenty-five cents worth of cigars; then down Forsyth Street to the factory; unlocked the street door and the inner door and left it open and went on upstairs to tell the boys that I had come

back and wanted to know if they were ready to go, and at that time they were preparing to leave. I went immediately down to my office and opened the safe and my desk and hung up my coat and hat and started to work on the financial report. Mr. Schiff had not come down and there was additional work for me to do.

I heard the bell ring on the time clock and Arthur White and Harry Denham came into the office and Arthur White borrowed $2.00 from me in advance on his wages. I had gotten to work on the financial sheet, figuring it out, when I happened to go out to the lavatory and on returning to the office, I noticed Newt Lee, the watchman, coming from towards the head of the stairs, coming towards me. I looked at the clock and told him the night before to come back at 4 o'clock for I expected to go to the base ball game. Newt Lee came along and greeted me and offered me a banana; I declined the banana and told him that I had no way of letting him know sooner that I was to be there at work and that I changed my mind about going to the ball game. I told him that he could go if he wanted to or he could amuse himself in any way he saw fit for and hour and a half, but to be sure and be back by half-past 6 o'clock. He went off down the stair case leading out and I returned to my office.

(After describing at length his work on the financial sheet and orders.)

I finished this work that I have just outlined at about 5 minutes to 6, and I proceeded to take out the clock strips from the clock which were used that day and replace them. The slips I put in that night were stamped with a blue ink, with a rubber dating stamp, "April 28th." Saturday night we put the slips into the clock dated with the date on which the help were coming into the factory to go about their regular duties and register on the Monday following, which was April 28th. As I was putting these slips into the clock, I saw Newt Lee coming up the stairs, and looking at the clocks, it was as near as may be 6 o'clock. I finished putting the slip in and as I was washing, heard Newt Lee ring the bell on the clock when he registered his first punch for the night, and he went down stairs to the front door to await my departure. After washing, I went down stairs to the front door. I saw outside on the street Newt Lee in conversation with Mr. J. M. Gantt, a man that I had let go from the office two weeks previous. Newt Lee told me that Mr. Gantt wanted to go back up into the factory, and he had refused him admission, because his instructions were for no one to go back into the factory after he went out, unless he got contrary instructions from Mr. Darley or myself. I asked him what he wanted, he said he had a couple of pairs of shoes, black pair and tan pair, in the shipping room; told Newt Lee it would be all right to pass Gantt in, and Gantt went in, Newt Lee closed the door locking it after him. I then walked up Forsyth Street, posted two letters, got a drink at soda fount, and bought my wife a box of candy. Arrived home about 6:25; sat looking at the paper until about 6:30 when I called up at the factory to find out if Mr. Gantt had left. Couldn't get Newt Lee then. At 7 I again called the fac-

tory, got Newt Lee and asked him if Mr. Gantt had gone again, he says, "Yes." I asked if everything else was all right at the factory; it was, and then I hung up and had supper, and phoned to my brother-in-law, Mr. Ursenbach if he would be at home that evening, but he said he had another engagement, so I stayed home reading a newspaper or magazine. About 8 I saw Minola pass out on her way home. That evening, my parents in law, Mr. and Mrs. Emil Selig, had company, and among those present were Mr. and Mrs. Morris Goldstein, Mr. and Mrs. M. Marcus, Mrs. A. E. Marcus and Mrs. Ike Strauss. Sat reading in the hall until 10:30 when I turned out the gas, went into the dining room, bade them all good night, and went upstairs to take my bath, a few minutes later my wife followed me upstairs.

Sunday, April 27th, I was awakened before 7 o'clock by the telephone. The man that spoke was City Detective Starnes; he said, "Is this Mr. Frank, superintendent of the National Pencil Company?" I says, "Yes, sir," he says, "I want you to come down to the factory right away," I says, What's the trouble, has there been a fire? He says, "No, a tragedy, I want you to come down right away;" I says, All right, he says, "I'll send an automobile for you," I says, All right, and hung up and went upstairs to dress; was in the midst of dressing when the automobile drove up, the bell rang and my wife went down stairs to answer the door. She had on a night dress with a robe over it. I followed my wife in a minute or two. I asked them what the trouble was, and the man who I afterwards found out was detective Black, hung his head and didn't say anything. They asked me did I know Mary Phagan, and I told them I didn't, they then said to me, didn't a little girl with long hair hanging down her back come up to your office yesterday some time for her money. I says, Yes, I do remember such a girl coming up to my office that worked in the tipping room, but I didn't know her name was Mary Phagan. "Well, we want you to come down right away with us to the factory." I didn't have breakfast, but went right on with them in the automobile. They took me to the undertaker's, as they wanted me to see the body and see if I could identify the little girl. One of the two men asked the attendant to show us the way into where the body was, and the attendant went down a long, dark pasageway with Mr. Rogers following, then I came, and Black brought up the rear until we got to a place that was apparently the door to a small room—very dark—the attendant went in and suddenly switched on the electric light, and I saw the body of the little girl. Mr. Rogers stood to my right, inside of the room, I stood right in the door, leaning up against the right facing of the door, and Mr. Black was to the left, leaning on the left facing, but a little to my rear, and the attendant, whose name I have since learned was Mr. Gheesling, was on the opposite side of the little cooling table to where I stood. He removed the sheet which was covering the body, and took the head in his hands, turned it over, put his finger exactly where wound in the left side of the head was located. I noticed the hands and arms of the little girl were very dirty—blue and ground with dirt and cinders, the

nostrils and mouth just full of sawdust and swollen, and there was a deep scratch over the left eye on the forehead; about the neck there was twine—a piece of cord similar to that which is used at the pencil factory and also a piece of white rag. After looking at the body, I identified that little girl as the one that had been up shortly after noon the day previous and got her money from me. We then left the undertaking establishment, got in the automobile and rode over to the pencil factory. Just as we arrived, I saw Mr. Darley going into the front door with another man. We went up to the second floor, the office floor, I went into the inner office, hung up my hat, and in the inner office I saw the night watchman, Newt Lee, in the custody of an officer, who I think was detective Starnes —the man who had phoned me. I unlocked the safe and took out the pay roll book and found that it was true that a little girl by the name of Mary Phagan did work in the metal plant, and that she was due to draw $1.20, the pay roll book showed that, and as the detective had told me that some one had identified the body of that little girl as that of Mary Phagan, there could be no question but what it was one and the same girl. The detectives told me then they wanted to take me down in the basement and show me exactly where the girl's body was found, and the other paraphernalia that they found strewed about; and I went to the elevator box—the switch box, so that I could turn on the current, and found it open. I got on the elevator and started to pull the rope to start it going, and it seemed to be caught, and I couldn't move it. However, Mr. Darley was successful in getting it loose, and it started up.

In the basement, the officers showed us just where the body was found, and in behind the door to the dust bin, they showed us where they found the hat and slipper on the trash pile, and they showed us where the back door, where the door to the rear was opened about 18 inches. We all went back upstairs and Mr. Darley and myself got some cords and some nails and a hammer and went down the basement again to lock up the back door, so that we could seal the factory from the back and nobody would enter. After returning upstairs, Mr. Darley and myself accompanied Chief Lanford on a tour of inspection through the three upper floors of the factory. We did not notice anything peculiar.

We removed the clock slip. After putting a new slip in the clock, we all went out of the factory and went downstairs and locked the door and we went to the police headquarters.

Now, gentlemen, I have heard a great deal, and so have you, in this trial, about how nervous I was that morning. I was nervous, completely unstrung; imagine, awakened out of my sound sleep, and a morning run down in the cool of the morning in an automobile driven at top speed, without any food or breakfast, rushing into a dark passageway, coming into a darkened room, and then suddenly an electric light flashed on, and to see the sight that was presented by that poor little child; why, it was a sight that was enough to drive a man to distraction. Of course I was nervous; any man would be nervous if he was a man. We rode to headquarters very quickly and Mr. Darley and I went up to Chief Lanford's

office where I sat and talked and answered every one of their questions freely and frankly, trying to aid and to help them in any way that I could. After staying there a few minutes, Mr. Darley and myself went over to Bloomfield's; they told us somebody was busy with the body at that time and we couldn't see it. So we went over to Montag Brothers and found that nobody was down there. After that I caught a Georgia Avenue car and rode to the house of Mr. Sig Montag, our General Manager, and discussed with him at length and in detail what I had seen that morning and what the detectives had to say. I returned to my home at about a quarter to 11; washed up and had my breakfast in company with my wife. I told her of the experience I had had that morning. I left the house and went to Mrs. Wolfsheimer's house; found quite a company of people, and the conversation turned largely on what I had seen that morning. The conversation was about the little girl that had been killed in the pencil factory that morning, although it was at that time as much a puzzle to me as it was apparently to everybody else. Returned with my wife to my home, where we took our lunch together with my parents-in-law, with Minola McKnight serving. After dinner, read a little while, and then went down town; went into the undertaker Bloomfield's, where I saw a large crowd of people nearby on the outside; on entering I found quite a number of people who were working at the pencil factory; stood in line and went into the room again and stayed a few minutes in the mortuary chamber. Then Mr. Darley and Mr. Schiff and myself went down to police headquarters and into Chief Lanford's office, and the three of us answered all sorts of questions that not only Chief Lanford, but the other detectives would shoot at us. Mr. Darley said he would like to talk to Newt Lee and went into another room. The detectives showed us the two notes and the pad back with still a few unused leaves to it, and the pencil that they claimed they had found down in the basement near the body. One of these notes was written on a sheet of pencil pad paper, the other was written on a sheet of yellow paper, apparently a yellow sheet from the regulation order pad or order book of the National Pencil Company. These are the two notes. Mr. Schiff and myself left police headquarters down to Jacobs' Alabama and Whitehall Street store, and each of us had a drink, and I bought a cigar for each of us at the cigar counter. I returned to my home about a quarter to 4. Went out again. Reached home about 7 or a little after for supper. After supper had callers. About 10 o'clock, all the company left, and I went upstairs with my wife and retired about 10 o'clock.

Next morning, arose about 7 and washed and shaved and dressed, and while I was dressing the door bell rang, and my wife again answered the door, and there were two detectives down there, one was John Black, and the other, Mr. Haslett, of the city detectives. They told me they wanted me to step down to headquarters with them. On the way down, I asked Detective Haslett what the trouble down at the station house was, and he said: "Well, Newt Lee has been saying something, and Chief Lanford wanted to ask you

a few questions about it;" and I said, What did Newt Lee say; "Well, Chief Lanford will tell you when you get down there." When I got down to police headquarters, Chief Lanford hadn't come down yet. I waited around the office possibly an hour, chatting and talking to the officers. Later Chief Lanford came in and says: "Come here," and beckoned to me; and I went with him and went into his room, in his office, and while I was in there, to the best of my recollection, anyhow it is my impression now, that this very time slip, on which at that time that "taken out at 8:26," with the two lines under it, had not been erased, was shown to me, and in looking over it and studying it carefully, I found where the interval of an hour had occurred three times during the time that Newt Lee had been punching on that Saturday night, April 26th. When I had first looked at it, I only noticed that every line had a punch on it, but I didn't notice what time the punch marks themselves were on; this time I studied the slip carefully, it was the same slip I had taken out of the clock, Chief Lanford or one of the officers handed it to me at police headquarters, which I absolutely identified with the writing which was on it, which you can readily see if you look now, even though it has been erased. There seemed to be some altercation about Mr. Rosser coming in that room, and I heard Mr. Rosser say: "I am going into that room, that man is my client;" that was the first intimation I had that Mr. Rosser was going to look after my interests in this matter. Chief Beavers stated that he wanted me to give him a statement, and he said: "Mr. Frank, will you give us a statement?" And I said: Certainly. After I had given the statement, I overheard Mr. Rosser say: "Why, it is preposterous, a man who would have done such a deed must be full of scratches and marks and his clothing must be bloody." I turned and jumped up and showed them my underclothing and my top shirt and my body, I bared it to them all that came within the range of their vision. I had everything open to them, and all they had to do was to look and see it. After that, Mr. Rosser insisted that two of the detectives, Mr. Black and another detective, accompany Mr. Hass, Mr. Herbert Hass, and myself to my home and look over my soiled clothing for the past week, which I anticipated had not been given to the washwoman. They complied with this request. The detectives immediately went uptairs to my room with Mr. Haas and myself, and I took the laundry bag in which my soiled laundry is always kept and emptied it out on the bed, and they examined each and every article of clothing that I had discarded that past week, and I again opened the clothing which I was then wearing, and which was the brown suit I have here, this brown suit is the same suit I wore that Saturday, April 26th, and Monday, April 28th, and I have worn that suit continuously since then until the weather became so hot, and it has neither been pressed nor cleaned since them. The detectives were evidently perfectly well satisfied with what they had seen there, and they left without any further remarks with Mr. Haas. After dinner, I telephoned down to the office and to Mr. Schiff, and told him to get Mr. Montag's permission for the Pencil Company to put

on a detective, preferably a Pinkerton detective, to work with and assist the city detectives in ferreting out the crime. Then I went down town to the pencil factory, and on going into the office, I saw the following men there: Mr. Herbert Schiff, Mr. Wade Campbell, Mr. Darley—Mr. Holloway was out in his place in the hall, and Mr. Stelker and Mr. Quinn and Mr. Ziganke, these foremen were sitting around there because we had shut down there, as they told me, due to the fact that the plant was wholly demoralized, the girls were running into hysterics, they couldn't stick at their work, they were crying and going on over what had happened there. Mr. Quinn said he would like to take me back to the metal department on the office floor where the newspapers had said that Mr. Barrett of the metal department had claimed he had found blood spots, and where he had found some hair. They then took me over to the place in front of the dressing room where it was claimed the blood spots were found. I examined those spots; took a strong electric flash lamp that he had around there and looked at them and examined them carefully. With reference to those spots that are claimed to be blood that Mr. Barrett found, I don't claim they are not blood, they may have been, they are right close to the ladies' dressing room, and we have had accidents there. Where people just cut their fingers and they go back to work, we don't make any record of that, and we have people there cutting their fingers there very often, and when they cut their fingers, their line of travel is right by that place where Mr. Barrett found those spots, right to the office. While I don't say that this is not blood, it may be, but it could also have been paint. When I got down and looked at it, you could have scratched away from the top of those dark stains an accumulation of dirt that was the accumulation of at least three months, from off the top of those spots, without touching the spot itself. That white stuff, in my opinion, was haskoline compound.

I returned after making this examination to my office and gathered up what papers I had to take over to Montag Brothers, and I took the financial report which I had made out the Saturday afternoon previous, and I talked it over with Mr. Sig Montag.

I returned from Montag Brothers to the pencil factory, being accompanied by one of the traveling men, Mr. Sol Hein, and on my arrival I went up into the office and distributed the various papers all over the factory to be acted on the next day. In a few minutes Mr. Harry Scott of the Pinkerton detectives came in and I took him aside into my office, my private office, and spoke to him in the presence of Mr. N. V. Darley and Hr. Herbert Schiff. I told him that I expected that he had seen what had happend at the pencil factory by reading the newspapers and knew all the details. He said he didn't read the newpapers and didn't know the details, so I sat down and gave him all the details that I could; took him around the building, took him first back to the metal room and showed him the place where the hair had been found; showed him the spot in front of the dressing room and took him to the fourth floor; took him down into the basement and made a thorough search, and that included an examination of the elevator well which was at bottom

of elevator shaft; then went back and I showed him where the officer said the slipper had been found, the hat had been found and the little girl's body was located. I showed him, in fact, everything that the officers had showed us.

On Friday I arrived at the pencil factory about 8:30; immediately entered upon my routine work sending the various orders to the various places in the factory where they were due to go; a little later detectives Scott and Black came up to the factory and said: "Mr. Frank, we want you to go down to headquarters with us," and I went with them. We went down to headquarters and I have been incarcerated ever since. Detective Scott and detective Black showed me a little piece of material of some shirt and asked me if I had a shirt of that material; told them I didn't think I ever had a shirt of that description; they brought in Newt Lee, the nightwatchman from a cell and showed him the sample; he said he had a shirt like that but didn't remember having worn it for two years. Detectives Scott and Black then opened a package they had and disclosed the full shirt of that material that had all the appearance of being freshly stained with blood, and had a very distinct odor. Newt Lee was taken back to the cell. After a time Chief Langford came over to me and began an examination of my face and of my head and my hands and my arms. Detective Starnes took me down to the desk sergeant where they searched me and entered my name on the book under a charge of suspicion. Detectives Scott and Black came in at midnight, Tuesday, April 29th, and said: "Mr. Frank, we would like to talk to you a little bit." They stressed the possibility of couples having been let into the factory at night by the night watchman, Newt Lee. I told them that I didn't know anything about it, that if I had, I certainly would have put a stop to it long ago. They said: "Mr. Frank, you have never talked alone with Newt Lee. You are his boss and he respects you. See what you can do with him. We can't get anything more out of him, see if you can." I says: "All right, I understand what you mean; I will do my best," because I was only too willing to help. Black says: "Now put it strong to him, put it strong to him, and tell him to cough up and tell all he knows. Tell him that you are here and that he is here and that he better open up and tell all he knows about happenings at the pencil factory that Saturday night, or you will both go to hell."

In a few minutes detective Starnes brought up Newt Lee from the cell room and handcuffed him to a chair. I spoke to him at some length in there, but I couldn't get anything additional out of him. He said he knew nothing about couples coming in there at night, and remembering the instructions Mr. Black had given me I said: "Now, Newt, you are here and I am here, and you had better open up and tell all you know, and tell the truth and tell the full truth, because you will get us both into lots of trouble if you don't tell all you know," and he answered me like an old negro: "Before God, Mr. Frank, I am telling you the truth and I have told you all I know." And the conversation ended right there. Within a minute or two afterwards the detectives came back into the room, that

is, detective Scott and detective Black, and then began questioning Newt Lee, and then it was that I had my first initiation into the third degree of the Atlanta police department. The way that fellow Black cursed at that poor old negro, Newt Lee, was something awful. He shrieked at him, he hollered at him, he cursed him, and did everything but beat him. Then they took Newt Lee down to a cell and I went to my cot in the outer room.

Before closing my statement, I wish to touch upon a couple of insinuations and accusations other than the one on the bill of indictment, that have been leveled against me so far during the trial. The first is this, the fact that I would not talk to the detectives; that I would not see Jim Conley.

On Sunday morning I went to headquarters twice, willingly, without anybody coming for me; I answered frankly and unreservedly, giving them the benefit of the best of my knowledge. On Monday they came for me; I went down and answered any and all of their questions and gave them a statement which they took down in writing. Tuesday I was at police station again, and answered every question; talked to anybody who wanted to talk with me about it, and I have even talked with them at midnight when I was just about to go to bed. I spoke to Newt Lee alone, but what was the result? They commenced and they grilled that poor negro and put words into his mouth that I never said, and twisted not alone the English, but distorted my meaning. I decided then and there that if that was the line of conduct they were going to pursue, I would wash my hands of them. On May 1st, was taken to the Fulton County Tower. On May 3rd detectives Black and Scott came up to my cell; wanted to speak to me alone without any of my friends around. Black said: "Mr. Frank, we are suspicious of that man Darley. We are watching him; we have been shadowing him. Now open up and tell us what you know about him." I said: "Gentlemen, you have come to the wrong man, because Mr. Darley is the soul of honor and as true as steel. He would not do a crime like that, he couldn't do it." And Black said: "Come on, Scott, nothing doing," and off they go. That showed me how much reliance could be placed in either the city detective or our own Pinkerton detectives, and it was for this reason that I didn't see Conley, surrounded with a bevy of city detectives and Mr. Scott, because I knew that there would not be an action so trifling, that there was not an action so natural but that they would distort and twist it to be used against me, and that there was not a word that I could utter that they would not deform and twist and distort to be used against me, but I told them through Mr. Klein that if they got the permission of Mr. Rosser to come, I would speak to them; would speak to Conley and face him or anything they wanted—if they got that permission or brought Mr. Rosser. Now, that is the reason that I have kept my silence, not because I didn't want to, but because I didn't want to have things twisted.

Then that other implication, the one of knowing that Conley could write, and didn't tell the authorities.

On May 1st I was taken to the tower. On the same date the

negro Conley was arrested. I didn't know anybody had any suspicions about him. His name was not in the papers; I had no inkling that he ever said he couldn't write. I was sitting in that cell in the Fulton County jail, about April 12th or 14th, Mr. Leo Gottheimer, a salesman for the National Pencil Company, came running over, and says, "Leo, the Pinkerton detectives have suspicions of Conley. He keeps saying he can't write; these fellows over at the factory know well enough that he can write, can't he?" I said: "Sure he can write." "We can prove it; the nigger says he can't write and we feel that he can write." I said: "I know he can write. I have received many notes from him asking me to loan him money. In other words, I have received notes signed with his name, purporting to have been written by him, though I have never seen him to this date use a pencil. If you will look into a drawer in the safe you will find the card of a jeweler from whom Conley bought a watch on the installment. If you go to that jeweler you may find some sort of a receipt that Conley had to give." Gottheimer took that information to the Pinkertons; they did just as I said; they got the contract with Conley's name on it; Scott then told the negro to write. The man who found out or paved the way to find out that Jim Conley could write is sitting right here in this chair. That is the truth about it.

Then that other insinuation, so dastardly that it is beyond the appreciation of a human being, that my wife didn't visit me; the truth is, that on April 29th, when I was taken in custody at headquarters, my wife was there to see me; was downstairs on the first floor; I was up on the top floor. She was there almost in hysterics, having been brought there by her two brothers-in-law, and her father. Rabbi Marx was with me at the time. I consulted with him as to the advisability of allowing my dear wife to come up to the top floor to see me in those surroundings with city detectives, reporters and snapshooters; I thought I would save her that humiliation, because I expected any day to be returned once more to her side at home. Gentlemen, we did all we could do to restrain her in the first days when I was down at the jail from coming on alone down to the jail, but she was perfectly willing to even be locked up with me and share my incarceration.

Gentlemen, I know nothing whatever of the death of little Mary Phagan. I had no part in causing her death nor do I know how she came to her death after she took her money and left my office. I never even saw Conley in the factory or anywhere else on April 26, 1913.

The statement of the witness Dalton is utterly false as to coming to my office and being introduced to me by the woman Daisy Hopkins. If Dalton was ever in the factory building with any woman, I didn't know it. I never say Dalton in my life to know him until this crime.

Miss Irene Jackson is wholly mistaken in supposing that I ever went to a ladies' dressing room for the purpose of making improper gaze into the girls' room. I have no recollection of occasions of which she speaks. There was no bath or toilet in that room, and it

had windows opening onto the street. There was no lock on the door, and I know I never went into that room at any hour when the girls were dressing. Occasionally I have had reports that the girls were flirting from this dressing room through the windows with men; sometimes the girls would loiter in this room when they ought to have been doing their work. It is possible that on some occasions I looked into this room to see if the girls were doing their duty and were not using this room as a place for loitering and for flirting.

The statement of Conley is a tissue of lies from first to last. I know nothing whatever of the cause of the death of Mary Phagan, and Conley's statement as to his coming up and helping me dispose of the body, or that I had anything to do with her or to do with him that day is a monstrous lie.

The story as to women coming into the factory with me for immoral purposes is a base lie and the few occasions that he claims to have seen me in indecent positions with women is a lie so vile that I have no language with which to fitly denounce it.

I have no rich relatives in Brooklyn, N. Y. My father is an invalid. My father and mother together are people of very limited means, who have barely enough upon which to live. My father is not able to work. I have no relative who has any means at all, except Mr. M. Frank who lives in Atlanta, Ga. Nobody has raised a fund to pay the fees of my attorneys. These fees have been paid by the sacrifice in part of the small property which my parents possess.

Gentlemen, some newspaper men have called me "the silent man in the tower," and I kept my silence and my counsel advisedly, until the proper time and place. The time is now; the place is here; and I have told you the truth, the whole truth.

Miss Emily Mayfield. Worked at the pencil factory last year; have never been in the dressing room when Mr. Frank would come in and look at anybody that was undressing.

Cross-examined. Don't remember any occasion when Mr. Frank came in the dressing room door while Miss Irene Jackson and her sister were there.

Annie Osborne, Rebecca Carson, Maude Wright and *Mrs. Ella Thomas* said they were employees of the National Pencil Company. Mr. Frank's general character was good; that Conley's general character for truth and veracity was bad and that they would not believe him on oath.

Mollie Blair, Ethel Stewart, Cora Cowan, B. D. Smith, Lizzie Word, Bessie White, Grace Atherton and *Mrs. Barnes,* employees of the pencil company, said that the character of Leo M. Frank was good; that they have never gone with him at any time or place for any immoral purpose, and that they have never heard of his doing anything wrong.

Corinthia Hall, Annie Howell, Lillie M. Goodman, Velma Hayes, Jennie Mayfield, Ida Holmes, Willie Hatchett, Mary Hatchett, Minnie Smith, Marjorie McCord, Lena McMurty, Mrs. W. R. Johnson, Mrs. S. A. Wilson, Mrs. Georgia Denham, Mrs.

O. Jones, Miss Zilla Spivey, Charles Lee, N. V. Darley, F. Ziganki, A. C. Holloway and *Minnie Foster*, testified that they were employees of the pencil company and knew Leo M. Frank, and that his general character was good.

D. I. MacIntyre, B. Wildauer, Mrs. Dan Klein, Alex Dittler, Dr. J. E. Sommerfield, F. G. Schiff, Al Guthman, Joseph Gershon, P. D. McCarley, Mrs. M. W. Meyer, Mrs. David Marx, Mrs. A. I. Harris, M. S. Rice, L. H. Moss, Mrs. L. H. Moss, Mrs. Joseph Brown, E. E. Fitzpatrick, Emil Dittler, Wm. Bauer, Miss Helen Loeb, Al Fox, Mrs. Martin May, Julian V. Boehm, Mrs. Mollie Rosenberg, M. H. Silverman, Mrs. L. Sterne, Chas. Adler, Mrs. R. A. Sonn, Miss Ray Klein, A. J. Jones, L. Einstein, J. Bernard, J. Fox, Marcus Loeb, Fred Heilbron, Milton Klein, Nathan Coplan, Mrs. J. E. Sommerfield, all residents of Atlanta, have known Leo M. Frank ever since he has lived in Atlanta; his general chacater is good

Mrs. M. W. Carson, Mary Pirk, Mrs. Dora Small, Julia Fuss, R. P. Butler, Joe Stelker, testified that they were employees of the pencil company; that they knew Leo M. Frank, and that his general character is good.

EVIDENCE IN REBUTTAL FOR STATE

J. R. Floyd, R. M. Goddard, A. L. Goddard, N. J. Ballard, Henry Carr, J. S. Rice, Lem Smith testified that they knew Daisy Hopkins; that her general caracter for truth and veracity was bad, and that they would not believe her on oath.

J. R. Floyd. Heard Daisy Hopkins talk about Frank and said there was a cot in the basement.

J. T. Hearn. Have known C. B. Dalton from 1890 to 1904; at first his general character was bad, but the last I knowed of him it was good; would believe him on oath.

R. V. Johnson. Have known C. B. Dalton for about 20 years. His character for truth and veracity is good; would believe him on oath.

W. M. Cook, W. J. Elder, A. B. Houston, J. T. Born, W. M. Wright, C. B. McGinnis, F. P. Hefner, W. C. Hale, Leon Boyce, M. G. Caldwell, A. W. Hunt, W. C. Patrick knew C. B. Dalton; his general character for truth and veracity was good; they would believe him on oath.

Myrtle Cato, Maggie Griffin, Mrs. C. D. Donegan, Mrs. H. R. Johnson, Miss Marie Carst, Miss Nellie Pettis, Mary Davis, Mrs. Mary E. Wallace, Estelle Winkle, Carrie Smith were formerly employed at the pencil company and worked at the factory; Leo M. Frank's character for lasciviousness was bad.

Mamie Kitchens. Have worked at the National Pencil Company two years; am on the fourth floor; was in the dressing room with Miss Irene Jackson when she was undressed. Mr. Frank opened the door, stuck his head inside; he did not knock; he just stood there and laughed; Miss Jackson said: "Well, we are dressing, blame it," and then he shut the door.

Cross-examined. He asked us if we didn't have any work to

do it was during business hours; have never met Mr. Frank anywhere, or any time for immoral purposes.

Ruth Robinson. Have seen Leo M. Frank talking to Mary Phagan. He would stand just close enough to her to tell her about her work; would show her how to put rubbers in the pencils; would just take up the pencil and show her how to do it; he called her Mary.

Dewey Hewell. Stay in the Home of the Good Shepherd in Cincinnati; I worked at the pencil factory four months; have seen Mr. Frank talk to Mary Phagan two or three times a day in the metal department; have seen him hold his hand on her shoulder. He called her Mary; he would stand pretty close to her; would lean over in her face.

Cross-examined. All the rest of the girls were there when he talked to her; don't know what he was talking to her about.

Myrtice Cato and Maggie Griffin had seen Miss Rebecca Carson go into the ladies' dressing room on the fourth floor with Leo M. Frank two or three times during working hours; there were other ladies working on the fourth floor at the time this happened.

J. E. Duffy. Worked at the National Pencil Company; cut a forefinger on the left hand; went to the office to have it dressed; a few drops of blood dropped on the floor at the machine where I was hurt; nowhere else except at that machine; none near the ladies' dressing room or the water cooler; had a large piece of cotton wrapped around my finger.

Cross-examined. Never saw any blood anywhere except at the machine; went from the office to the Atlanta Hospital to have my finger attended to.

W. E. Turner. Worked at the National Pencil Company; saw Leo Frank talking to Mary Phagan on the second floor, about the middle of March; there was nobody else in the room; she was going to work and he stopped to talk to her; she told him she had to go to work; he told her that he was the superintendent of the factory, and that he wanted to talk to her, and she said she had to go to work; she backed off and he went on towards her talking to her.

Cross-examined. Can't describe Mary Phagan; don't know any of the other little girls in there; don't remember who called her Mary Phagan, a young man on the fourth floor told me her name was Mary Phagan; I don't know who he was; didn't know anybody in the factory; can't describe any of the girls.

W. P. Merk. Know Daisy Hopkins; met her at 2:30 or 3:30 on a Saturday; she said she was going to pencil factory; made an engagement with her to go to her room to see her that Saturday; was in a room with her at the corner of Walker and Peters street about 8:30 o'clock; she told me she had been to the pencil factory that afternoon; her general character for truth and veracity is bad; would not believe her on oath.

George Gordon. Am a lawyer; was at police station part of the time when Minola McKnight was making her statement; went down there with habeas corpus proceedings to have her sign the affidavit; I sat down and waited

outside for her two hours, then went in and found Mr. February reading over to her some stenographic statement he had taken. As to whether Minola McKnight did not sign this paper freely and voluntarily, it was signed in my absence while I was at police station. That paper is substantially the notes that Mr. February read over to her.

Albert McKnight. This sideboard sets more this way than it was at the time I was there.

Cross-examined. Don't know if the sideboard was changed, but it wasn't setting like that is in the corner.

R. L. Craven. Am connected with the Beck and Gregg Hardware Co. Albert McKnight also works there. He asked me to go down and see if I could get Minola McKnight out when she was arrested. I was present when she signed that affidavit. They brought Minola McKnight in and we questioned her as to the statements Albert had given me; at first she would not talk, she said she didn't know anything about it. I told her that Albert made the statement that he was there Saturday when Mr. Frank came home, and he said Mr. Frank came in the dining room and stayed about ten minutes and went to the sideboard and caught a car in about ten minutes after he first arrived there, and that Albert had said that Minola had overheard Mrs. Frank tell Mrs. Selig that Mr. Frank didn't rest well and he came home drinking and made Mrs. Frank get out of bed and sleep on a rug by the side of the bed and wanted her to give him his pistol to shoot his head off and that he had murdered somebody, or something like that. Minola at first hesitated, but finally she told everything that was in that affidavit. When she did that Mr. Starnes, Mr. Campbell, Mr. February, Albert McKnight, Mr. Pickett, and Mr. Gordon were there.

E. H. Pickett. Work at Beck & Gregg Hdw. Co.; was present when the affidavit was signed by Minola McKnight. We questioned her about the statement Albert had made, and she denied it all at first. She said she had been cautioned not to talk about this affair by Mrs. Frank or Mrs. Selig. She stated that Albert had lied in what he told us. She finally began to weaken on one or two points and admitted that she had been paid a little more money than was ordinarily due her. Nobody threatened her when she was there.

M. E. McCoy. Knew Mary Phagan. I saw her April 26th, in front of 12 Forsyth street. She was going towards the pencil company. It was near 12 o'clock. Know the time as I looked at my watch.

George Kendley. Am with the Georgia R. & P. Co.; saw Mary Phagan about noon on April 26. She was going to the pencil factory from Marietta Street.

Cross-examined. Was on the front end of the Hapeville car when I saw her. It is due in town at 12 o'clock. I told several people about seeing her the next day; didn't testify at the Coroner's inquest because nobody came to ask me; have not abused and villified Frank since this tragedy; know Mr. Brent; didn't tell him that Mr. Frank's children said he was guilty. As to whether I abused and villified

him in the presence of Miss Haas and other passengers, there has been so much talk that I don't know what has been said; don't remember saying that I would join a party to help lynch him if he got out.

N. Kelly. Am motorman of the Power Co. On April 26th was at the corner of Forsyth and Marietta Street about three minutes after 12; saw the English Avenue car of Matthews and Mr. Hollis arrive at Forsyth and Marietta about 12:03; knew Mary Phagan; she was not on that car.

W. B. Owens. Rode on the White City line of the Georgia Railway Co. We got to town on April 26th, at 12:05; don't remember seeing the English Avenue car that day.

O. Tillander. Mr. Graham and I went to the pencil factory April 26th, about 20 minutes to 12; saw Conley this morning; am not positive that he is the man I saw there; he looked to be about the same size.

E. K. Graham. Was at the pencil factory April 26th, with Mr. Tillander, about 20 minutes to 12. We met a negro on the ground floor. I don't know whether it was Jim Conley or not. He was about the same size. If he was drunk I couldn't notice it.

Ivy Jones. Saw Jim Conley at the corner of Hunter and Forsyth Streets on April 26th. He came in the saloon while I was there, between 1 and 2 o'clock. He was not drunk; left him a little after 2 o'clock.

Harry Scott. Picked up a cord in the basement when I went through there with Mr. Frank. Lee's shirt had no color on it, excepting that of blood; got the information as to Conley's being able to write from McWorth when I returned to Atlanta.

L. T. Kendrick. Was night watchman at the pencil factory. I punched the clocks for a whole night's work in two or three minutes; don't think you could have heard the elevator on the top floor if the machinery was running or any one was knocking on any of the floors.

C. J. Maynard. Have seen Burtus Dalton go in the factory with a woman in June or July, 1912. It was between 1:30 and 2 o'clock in the afternoon on Saturday.

W. T. Hollis. Have always said, that if Epps was on the car I did not see him.

J. D. Reed. Mr. Hollis told me Monday, April 28th, that Epps had gotten on the car and taken his seat next to Mary, and that the two talked to each other all the way as though they were little sweethearts.

Dr. Clarence Johnson. Am a specialist on diseases of the stomach and intestines; am a physiologist. A physiologist makes his searches on the living body; the pathologist makes his on a dead body. In the case before me my opinion is that the digestion of bread and cabbage was stopped within an hour after they were eaten.

Dr. George M. Niles. Confine my work to diseases of digestion. Every healthy stomach has a certain definite and orderly relation to every other healthy stomach. Assuming a young lady between 13 and 14 years of age at 11:30, April 26, 1913, eats a meal of cabbage and bread, that the next morning about 3 o'clock her dead body is found, with the other ev-

idence I have listened to. I would say that indicated that digestion had been progressing less than an hour.

Cross-examined. Coudn't presume to say how long that cabbage lay in Mary Phagan's stomach; if it had been a live, healthy stomach and the process of digestion was going on ordinarily, it would be pulverized in four or five hours. It would be more broken up and triculated than it is.

Dr. John Funk. Am professor of pathology and bacteriologist; was shown by Dr. Harris sections from the vaginal wall of Mary Phagan. They showed that the epithelium wall was torn off at points immedately beneath that covering in the tissues below, and there was infiltrated pressure of blood. They were engorged, and the white blood cells in those blood vessels were more numerous than you will find in a normal blood vessel. Those conditions must have been produced prior to death, because the blood could not invade the tissues after death. I would say that under those conditions that the epithelium was torn off before death; would not express an opinion as to how long cabbage had been in the stomach, from the appearance of the cabbage itself. It is reasonable to assume that the digestion had progressed probably an hour.

EVIDENCE FOR PRISONER IN SUR-REBUTTAL.

T. Y. Brent. Have heard Geo. Kendley on several occasions express himself very bitterly towards Leo Frank. He said Frank was nothing but an old Jew and they ought to take him out and hang him anyhow.

M. E. Stahl. Have heard Geo. Kendley, the conductor, express his feelings toward Leo Frank. He said that Frank was as guilty as a snake, and should be hung, and that if the court didn't convict him that he would be one of five or seven that would get him.

Miss C. S. Haas. Heard Kendley two weeks ago talk about the Frank case so loud that the entire street car heard it. He said that 90 per cent of the best people in the city, including himself, thought that Frank was gulty and ought to hang.

The State offered in evidence the following:

Frank's statement made before Lanford, Chief of Detectives, on Monday morning, April 28:

Am general superintendent and director of the National Pencil Company. Saturday, April 26th, was a holiday with our company, and the factory was shut down. There were several people who came in during the morning. The office boy and the stenographer were in the office with me until noon. They left about 12 or a little after. We have a day watchman there. He left shortly before 12 o'clock. After the office boy and the stenographer left, this little girl, Mary Phagan, came in, but at the time I didn't know that was her name. She came in between 12:05 and 12:10, to get her pay envelope, her salary. I paid her, and she went out of the office. I was in the inner

office. It was impossible to see the direction she went in when she left. I didn't keep the door locked downstairs that morning because the mail was coming in. I locked it at 1:10 when I went to dinner. Arthur White and Harry Denham were also in the building. They were working on the machinery, doing repair work; and Mrs. White was also in the building. I went up there and told them I was going to dinner and they had to get out, and they said they had not finished, then I said, "Mrs. White, you will have to go, for I am going to lock these boys in here." You can go in the basement from the front. I got back at 3 o'clock; went upstairs to tell those boys I was back; told them to "ring out when you go down to let me know when you go out," and they rang out, and Arthur White came in the office and said, "Mr. Frank, loan me $2.00," and I give him $2.00, and he walked away. I locked the outer door behind them. The night watchman got there at twenty minutes to 4. On Friday night I told him, "You had better come around early tomorrow, because I may go to the ball game. I told him he could go out; he got there so early and I was going to be there. He come back about four minutes to 6; the reason I know that I was putting the clock slips in and the clock was right in front of me. I said, "I will be ready in a minute," and he went downstairs and I came to the office and put on my coat and hat and followed him and went out. When I went out, talking to Newt Lee was J. M. Gantt, a man I had fired about two weeks previous. Newt told me he wanted to go up to get a pair of shoes he left while he was working there, and I said, "That's all right, go with him, Newt"; and I went on home, and got there about 6:25. I tried to telephone Newt when I got home; didn't get an answer, and at 7 o'clock I called him and asked him if Gantt got his shoes, and he said, "Yes, he got them," and I said, "Is everything all right," and he said, "Yes"; and the next thing I knew they called me at 7:30 the next morning; don't know that our watchman has been in the habit of letting people in the factory at any time. I took a bath Saturday night at my home. I changed my clothes. The clothes that I changed are at home, and this is the suit of clothes I was wearing Saturday. After I left the shop I went to Jacob's Pharmacy and bought a box of candy for my wife and got home about 6:25.

The State also introduced the following exhibits:

A piece of cord found around Mary Phagan's neck, about the size of a heavy twine, with a knot in it.

A rag that was found around Mary Phagan's neck, with blood on it. White piece of cloth, soiled. Looked as if it was a piece torn off from petticoat.

Four or five chips of wood, with red splotches on them, chipped up from the second floor of the National Pencil Company factory in front of ladies' dressing room.

A shirt found by detectives in trash barrel at Newt Lee's home. Shirt was very bloody; blood was on both sides of shirt and high up on armpits on the inside.

A scratch pad that Conley wrote on; an ordinary white scratch pad.

The following affidavit executed by Minola McKnight:

Saturday morning, April 26th, Mr. Frank left home about eight. Albert, my husband, got there about a quarter after one, and he was there when Mr. Frank came for dinner, which was about half-past one. Mr. Frank did not eat any dinner, and he left in about ten minutes. Mr. Frank come back to the house at seven o'clock that night, and Albert was there when he got there.

Tuesday, Mr. Frank says to me, "It is mighty bad, Minola, I might have to go to jail about this girl, and I don't know anything about it."

Sunday, Miss Lucile said to Mrs. Selig that Mr. Frank didn't rest so good Saturday night; she said he was drunk and wouldn't let her sleep with him, and she said she slept on the floor on the rug by the bad because Mr. Frank was drinking. Miss Lucile said Sunday that Mr. Frank told her Saturday night that he was in trouble, and that he didn't know the reason why he would murder, and he told his wife to get his pistol and let him kill himself.

When I left home to go to the solicitor general's office, they told me to mind how I talked. They pay me $3.50 a week, but last week they paid me $4.00, and one week she paid me $6.50. They would tell me to mind how I talked, and Miss Lucile gave me a hat.

Notes found by policemen in sawdust beside body of Mary Phagan, written on white and yellow paper.

(He said he would love me, laid down play like the night witch did it but that long tall black negro did boy hisself.)

[Mam that negro fire down here did this when i went to make water and he push me down a hole a long tall negro black that did (had) it. i right while play with me.]

The Prisoner's Counsel introduced in evidence the following statements made by the witness Conley before the trial:

STATEMENT OF JAMES CONLEY, MAY 18, 1913.

My full name is James Conley; reside 172 Rhodes Street, with Lorine Jones. This woman is not my wife, and I have been living with her a little over two years. I have been having intercourse with Lorine Jones. I have been employed as elevator man and roustabout at the National Pencil Co. factory in Atlanta for the past two years. Before going there, I was employed by Dr. L. Palmer and others as a driver. Previous to that time I worked for Adam Woodward, as a stable hand. I am 27 years of age.

On Saturday, April 26, at 10:30, left my house, and visited a number of saloons between Fair and Peters and Haynes and Peters Street. I arrived home at 2:30 p. m., and found L. Jones there and she asked me if I had any money. Gave her $3.50. At 3:30 p. m. or 4:00 p. m., Saturday, I purchased 15 cents worth of beer and then returned to the

house. I had also bought a pint of rye and some pan sausage. I remained at home all Saturday night, and at 12 o'clock noon, Sunday, walked up on Mitchell Street and got a cigarette, remaining there until 12:45 p. m., and returned home, remaining until 6:30 p. m., when I went to my mother's house, and got my lunch, and then returned home and remained at home until Monday, April 28th. On April 28th, reported for work at the pencil factory at 7:05 a. m.

STATEMENT OF JAMES CONLEY, MAY 24, 1913.

On Friday evening before the holiday, about one o'clock, Mr. Frank come up the aisle in the factory and asked me to come to his office. He asked me, could I write, and I told him yes, I could write a little bit, and he gave me a scratch pad and told me what to put on it, and told me to put on there, "dear mother," "a long, tall, black negro did this by himself," and he told me to write it two or three times on there. I wrote it on a white scratch pad, single ruled. He pulled out a box of cigarettes, and in that box he had $2.50, two paper dollars and two quarters, and I taken one of the cigarettes and handed him the box, and I told him he had some money in the box, and he said that was all right, I was welcome to that for I was a good working negro around there, and then he asked me where Gordon Bailey (Snowball, they call him) was, and I told him on the elevator, and he asked me if I knew the night watchman, and I told him no, and he asked me if I ever saw him in the basement, and I told him no, and I asked him not to take out any money for that watch man I owed, for I didn't have any to spare, and he told me he wouldn't, but he would see to me getting some money a little bit later. He told me he had some wealthy people in Brooklyn, and then he held his head up and looking out of the corner of his eyes and said, "Why should I hang?" and that's all I remember him saying to me. When I asked him not to take out any money for the watch, he said you ought not to buy any watch, for that big fat wife of mine wants me to buy her an automobile, but he wouldn't do it; I never did see his wife. On Tuesday morning after the holiday on Saturday, before Mr. Frank got in jail, he come up the aisle where I was sweeping and held his head over to me and whispered to me to be a good boy and that was all he said to me.

STATEMENT OF CONLEY, MAY 28, 1913.

I make this statement, my second statement, in regard to the murder of Mary Phagan. I made the statement that I went to the pencil factory on Friday, April 25, 1913, and went to Frank's office at four minutes to 1, which is a mistake. I made this statement in order that I might not be accused of knowing anything of this murder, for I thought that if I put myself there on Saturday, they might accuse me of having a hand in it; I now make my second and last statement, freely and voluntarily, after thinking over the situation,

and I have made up my mind to tell the whole truth, without the promise of any reward or from force or fear of punishment in any way.

I got up Saturday morning, April 26th, between 9 and half-past 9. I went to Peters Street, and stopped at the beer saloon, and bought two beers there for myself and give another fellow a beer, I don't know what his name was, but they call him Bob. Then I walks up to the Butt-In saloon and shoots dice and won 90 cents. Then I went to Earley's beer saloon, and bought two glasses of beer, and come out and bought a half pint of whiskey; I drank some of the whiskey, then I started to the Capitol City Laundry, and on my way there met Mr. Frank, going to Montags; he told me to wait a few minutes. He come back and told me to come to the factory, that he wanted to see me, and I went to the factory with him; and after we got to the factory, Mr. Frank took the box and put it there at the trash barrel, which was just to the right of the steps as you go in, for me to sit on. He told me to sit down there until I heard him whistle. Then he told me not to let Mr. Darley see me, and after Mr. Frank went up the steps, in a few minutes here comes a young lady downstairs, that was Miss Mattie. Then come Mr. Darley down, and he stopped Miss Mattie at the front door. I heard Mr. Darley say to her, "Don't worry, I will see that you get that next week." Then comes Mr. Holloway down, about five minutes after Mr. Darley had gone. Then come another colored fellow, a pegged-legged one, and he went up the steps, he had some bills in his hands, and Mr. Holloway come back down with the pegged-legged one and went out on the sidewalk and looked at the fellow's wagon, but what he said to him I don't know. Then Mr. Holloway went back upstairs and come back down and was gone for good. Then there comes another lady into the factory, and she had on a green looking dress; she works on the fourth floor. She stayed up there seven or eight minutes, and then she come back down with her money in her hand, and counted it, and went out the door; the next thing, Mr. Frank whistled for me twice; I went on up the stairs and the double doors on the stairway were closed, and I opened them and they shut themselves, and Mr. Frank was standing at the top of the steps, and he said, "You heard me, did you?" and I said, "Yes, sir," and Mr. Frank grabbed me by my arm so tight his hand was trembling. He carried me into his private office, then he saw two ladies coming, and he said to me, "Gee, here comes Miss Emma Clark and Miss Corinthia Hall," and he come back in there to me; he was walking fast and seemed to be excited, and he said to me, "Come right in here, Jim." Mr. Frank grabbed me and gave me a shove and put me in the wardrobe and he shut the doors and told me to stay there until after they had gone. Mr. Frank come and let me out of the wardrobe. I don't remember Miss Hall and Miss Clark using the telephone. I stayed in the wardrobe a pretty good while, for the whiskey and beer I had drank got me to sweating. I couldn't hear them talking, only I heard Miss Emma say, "Good morning." I said, "I got too hot in there," and he said, "Yes, I see you are sweating." He said, "Jim, can you

write?" I said, "Yes, sir, I can write a little bit," and then he give me a pencil that he got off the top of his desk, and told me to put on there, "dear mother, a long tall black negro did this by hisself," and when I went to put down "negro" I put it "n-e-g-r-o-s" and he said don't put no "s" there, he said that means negros and he said now rub the "s" off, and I rubbed the "s" out, and he said "It means just one person like yourself," and he told me to write it again, and I written it, and he looked at it and slapped me on the back and said, "That's all right, old boy," and he said "write it again," and I written it for him three times. Then Mr. Frank takes out a cigarette for himself and handed me the box, and I taken out a cigarette and lit it, and saw some money in the box, and he said that was all right, I could have that. Then Mr. Frank looked around at me and held up his head towards the top of the house and said, "Why should I hang, I have wealthy people in Brooklyn." I didn't know what he was talking about, I didn't have any idea in the world what he was talking about, and he was winking and rubbing his hands together and touching me on the shank with his foot and took a deep breath, he said, "Why should I hang?" and shook his head and rubbed his hands together. Then he asked me where was Snowball, and I told him I didn't know, and he asked me, did I know the night watchman, and I told him no, sir, I just knew him by passing him, and he asked me if I had seen him in the basement at any time, and I told him no, sir, that he would have to ask the fireman about that, for he was down in the basement more than any of us was, and when I told Mr. Frank that he stuck one finger in his mouth and said, "S-s-s-h, that's all right," and then Mr. Frank told me he was going to take that note I had written and send it off in a letter to his people when he wrote, and recommend me to them, because I was a good working negro around there, and he liked me, and when Mr. Frank said that I said "Don't take out another dollar for that watch man," and he said "All right, I won't," and he said, "I don't see why you want to buy a watch, because that big fat wife of mine wanted me to buy her an automobile, but I won't do it." Then he reached in his pocket and pulled out his watch and said, "It is nearly time for me to be going to dinner." Then I asked Mr. Frank if that was all he wanted with me right now, and he said, yes; but all the time, though, he was talking and jollying and going on with me, and I began to think it was something, for a white man to be playing with a negro, and during the time he cast his eyes up to the top of the house and said, "Why should I hang, I have wealthy people in Brooklyn." Then Mr. Frank said, "I will see you Monday, if I live and nothing happens, James," and I said, "Well, is that all you want for good Mr. Frank?" and he said, "Yes," and I saw him go to his desk and take out a brownish-looking scratch pad, and he took his pencil and made a mark on it. I took it to be an "M," but he shut the tablet up and looked at me and told me that was all he wanted with me. I pulled the front doors to as I went out, and I went to the beer saloon across the street and opened the cigarette box, and it had two paper dollars in there and two silver quarters, and I

laughed and said, "Good luck has done struck me," and I bought a ten-cent double-header and then went back to Peters Street, and hadn't none of the boys got there that I run with and I walks up there to the moving picture show and looked at the pictures. I got home about half-past 2 o'clock, and I took the bucket and went and got fifteen cents' worth of beer in it and come back home and sent the little girl to get a dime's worth of stove wood and a nickel's worth of pan sausage, and I eat half the pan sausage up raw, and I give my old lady $3.50, and the other little change I kept it, and I layed down across the bed and didn't leave home no more until 12 o'clock Sunday, in the day time. Next morning I got to the factory four or five minutes after 7 o'clock, and when I got there went upstairs to the dressing room, and in comes Gordon Bailey, and Joe Williams, and Mr. Wade Campbell, the lead inspector, and he says, "Wasn't it bad about that girl being killed," and we asked him, "which girl," and it seemed like he said "Mary Puckett," and we asked him whereabouts, and he said, "in the basement," and we asked him "if it was a white or colored girl," and he said, "it was a white girl," and we asked him how she got killed, and he said he didn't know, and I stayed down the aisle until about 9 o'clock, and went to the fourth floor, and then I said I would go to the basement and see who that was that got killed; when I got there there was such a crowd of white people there I couldn't go back there. Tuesday morning I got through with my work and went down stairs about half-past 9, and there was such a crowd down there I didn't stay long. About half-past 10 Mr. Frank came back up the aisle and leaned over to me and said, "Jim, be a good boy," and I said, "Yes, sir, I am, Mr. Frank," and when I heard from Mr. Frank again he was arrested. I come to work Wednesday morning, and works all that day, and Thursday morning I come to work, and went downstairs, and the fireman and another colored fellow was down there, and I asked the fireman where it was that they say the young lady got killed at, and he told me right around there, and I took a little piece of paper and went around there to see if I could see, but I couldn't see where anybody had been laying at, and I went upstairs, and stayed there until 12, and the detectives were giving us all subpoenas and got my subpoena and started to cleaning up at half-past 12, and got through cleaning at half-past 1. I went down to wash my shirt so I could have a clean one to wear to court, for I had been wearing this one for three weeks. Some of them saw me back there washing my shirt and called up the detectives, and when the detectives come up there I had done put on my shirt, and they asked me where was the shirt I was washing, and I told them this here was the shirt. They brought me down here and found there was no blood on the shirt, and give me my shirt back, and that's all I know.

CONLEY'S STATEMENT MAY 29, 1913.

On Saturday, April 26, 1913, when I come back to the pencil factory with Mr. Frank, I waited for him downstairs like he told me,

and when he whistled for me I went upstairs, and he asked me if I wanted to make some money right quick, and I told him, "Yes, sir," and he told me that he had picked up a girl back there and had let her fall, and that her head hit against something, he didn't know what it was, and for me to move her; I hollered and told him the girl was dead, and he told me to pick her up and bring her to the elevator, and I told him I didn't have nothing to pick her up with, and he told me to go and look by the cotton box there and get a piece of cloth, and I got a wide piece of cloth and tied her up in it. I carried her on my right shoulder, and she got too heavy for me and she slipped off and fell on the floor at the dressing room. I hollered for Mr. Frank to come there and help me, that she was too heavy for me, and Mr. Frank come down there and told me to pick her up, damn fool, and he run down there to me, and he was excited, and he picked her up by the feet, her head and feet were sticking out of the cloth, and then we brought her on to the elevator, Mr. Frank carrying her by the feet and me by the shoulders, and we brought her to the elevator, and then Mr. Frank says, "Wait, let me get the key," and he went into the office and got the key and come back and unlocked the elevator door and started the elevator down. We went on down to the basement, and Mr. Frank helped me take it off the elevator, and he told me to take it back there to the sawdust pile, and I picked it up and put it on my shoulder again, and Mr. Frank, he went up the ladder and watched the trap door to see if anybody was coming, and I took her back there and taken the cloth from around her and taken her hat and shoe which I had picked up upstairs right where her body was lying, and brought them down and untied the cloth and brought them back and throwed them on the trash pile in front of the furnace, and Mr. Frank was standing at the trap door at the head of the ladder. He didn't tell me where to put the things. I layed her body down with her head towards the elevator, lying on her stomach. Mr. Frank joined me back on the first floor. He said, "Gee, that was a tiresome job," and I told him his job was not as tiresome as mine was, because I had to tote it all the way from where she was lying to the dressing room, and in the basement from the elevator to where I left her. Then we went on into the office, and Mr. Frank he couldn't hardly keep still; he was all the time moving about from one office to the other, then he come back into the stenographer's office and come back, and he told me, Here comes Emma Clark and Corinthia Hall," and he opened the wardrobe and told me to get in there. Mr. Frank come back and I said, "Goodness alive, you kept me in there a mighty long time," and he said, "Yes, I see I did, you are sweating," and then me and Mr. Frank set down in a chair. Mr. Frank then took out a cigarette, and he gave me the box and asked me did I want to smoke. I handed him the cigarette box, and he told me that was all right, I could keep that, and I told him he had some money in it, and he told me that was all right, I could keep that; Mr. Frank then asked me to write a few lines on that paper, a white scratch pad he had there, and he told me what to put on there. After I got through writing, Mr.

Frank looked at it and said it was all right, and Mr. Frank looked up at the top of the house and said, "Why should I hang, I have wealthy people in Brooklyn"; I asked him what about me, and he told me that was all right about me, for me to keep my mouth shut, and he would make everything all right, and then I asked him where was the money he said he was going to give me, and Mr. Frank said, "Here, here is two hundred dollars," and he handed me a big roll of greenback money and I didn't count it; I stood there a little while, looking at it in my hand, and I told Mr. Frank not to take another dollar for that watch man I owed and he said he wouldn't—and the rest is just like I have told it before.

The reason I have not told this before is I thought Mr. Frank would get out and help me out, but it seems that he is not going to get out, and I have decided to tell the whole truth about this matter.

While I was looking at the money in my hands, Mr. Frank said, "Let me have that and I will make it all right with you Monday if I live and nothing happens," and he took the money back and I asked him if that was the way he done, and he said he would give it back Monday.

The Prisoner's Counsel put in evidence this letter, written by Leo M. Frank to Mr. Moses Frank, not typewritten but in long hand:

Atlanta, Ga., April 26, 1913.

Dear Uncle:

I trust that this finds you and dear Tante well after arriving safely in New York. I hope that you found all the dear ones well in Brooklyn and I await a letter from you telling me how you find things there. Lucile and I are well.

It is too short a time since you left for anything startling to have developed down here. The opera has Atlanta in its grip, but that ends today. I've heard a rumor that opera will not be given again in a hurry here.

Today was "Yondef" here, and the thin gray line of veterans, smaller each year, braved the rather chilly weather to do honor to their fallen comrades.

Enclosed you will find last week's report. The shipments still keep up well, tho' the result is not what one would wish. There is nothing new in the factory, etc., to report. Enclosed please find the price list you desired.

The next letter from me, you should get on board ship. After that I will write to the address you gave me in Frankfurt.

With much love to you both, in which Lucile joins me, I am

Your affectionate nephew,

Leo M. Frank.

THE SPEECHES TO THE JURY.

MR. HOOPER FOR THE STATE.

August 21.

Mr. Hooper. Gentlemen of the Jury: The object of this trial, as well as all other trials, is the ascertainment of truth and the attainment of justice. In the beginning, I want to have it understood that we are not seeking a verdict of guilty against the defendant unless he is guilty.

The burden of guilt is upon our shoulders — we confront the undertaking of putting it upon his. We recognize that it must be done beyond a reasonable doubt, and that it must be done purely by the evidence which we have produced before you.

We have cheerfully assumed this burden. We have cheerfully undertaken the task, but, there is not a single man on the prosecution who would harm a hair of the defendant's head wrongfully. We want him given the same measure of justice that should be meted to all classes of defendants. He is entitled, though, to the same degree of law as any other prisoner. But, he is not entitled to any more because of his wealth or social position. The arm of the law is strong enough to reach to the highest pinnacle of position and drag down the guilty, and strong enough to probe into the gutter and drag up the lowest.

There is not a case in the history of Georgia that has been as long and as important as this. With this importance, there arises a great degree of responsibility that rests upon your shoulders. I call your attention to the facts and law as they will be given you in the charge—your only instructions, the orders by which you will be guided in the end.

There is one thing I want to say, and that is this: This man should not be convicted purely because the law is seeking a victim. The law doesn't demand it. It demands only that you seek the truth, the absolute truth, the showing of

which is required by us, the prosecution. We are not looking for blood indiscriminately. We are only seeking the slayer of Mary Phagan, and in seeking him, I try as much as possible to feel as though I were one of you twelve.

Now, let's see what was the situation on April 26 in the pencil factory. This factory was being run by Sig Montag as its boss, Frank as its superintendent, assisted by the handsome Mr. Darley and the able Mr. Schiff.

As a citizen of Atlanta, I am not proud of conditions that existed in that factory! What was its moral atmosphere? The character of it appeals wonderfully to us as we seek the truth.

The defense has produced numbers of girl workers who told us of his character. They say it is good. That is only negative because he has never harmed them. They do not know him. But, while we are considering their stories, there are the stories of others—girls who left his factory because of his character and his conduct toward them. They say his character is bad. You have from the two your choice of either. Those who still are there—those who have never been harmed—and those who have left because of him and his character.

The law is a peculiar thing. We named over our plans with the first witnesses put on the stand. We showed at first just exactly what we had in view, exposed our hand, so to speak, and even went so far as to put the stories before you in so far as they were allowed to be told. They could have gone into detail were we permitted to have allowed them. They could have told of incidents that would have been convincing. We have adopted the only legal manner in which the matter could be sifted. It's on this principle: If fifty men were asked of the character of a certain place or man, and twenty-five or more say it is good, while as few as ten say it's bad, what is the character of this place or person, considering, of course, that all have an equal opportunity to observe? Would you say it was good? This question of character was one into which we were not permitted to go.

But the defense, on the other hand, were allowed to let down the bars and walk in.

That pencil factory was a great place for a man without a conscience. It was a great place for Frank, his handsome assistant, Mr. Darley, and the able Mr. Schiff. We find that Frank had coupled himself up for nightly meeting with Dalton, who now has, it seems, turned respectable. My friends, no doubt, will argue that it was strange a man of such business and social position should consort with such a character. It will be a good argument, likely, but probe a little deeper and see if Dalton was not the kind of man required by a dual personality such as possessed by Frank?

We all have dual personalities. There is not a man so good without evil, and no man so bad without good. But when the evil is predominant the man is bad. Vice versa with the good. A man may mingle with his varnished class by day, but when the shades of night are falling and the evil dominate, he doesn't go and get good men who can tell of his good character. He goes for his Dalton. We all are Dr. Jekyls and Mr. Hydes. There are two sides to each of us.

Dalton seems to have overcome this evil. He is apparently making good, as many substantial folks have told us on the witness stand. You can't blame Dalton so much.

This factory was under the control of this man Frank. It is a house of bad reputation. You find other acts of this sort committed therein. It is unsavory. Frank is its head. He contends he did not know Mary Phagan. Why, every day as he walked through the floor on which his office was situated, he passed by her at her machine. You find, gentlemen, that he often stopped at her place of duty to show her this or to show her that, to help her in her work. Not only that, but he followed her out of her beaten path—following like some wild animal, telling her of his superiority, coaxing, persuading, all the while she strove to return to her work at her mechine. You will notice on this diagram that every time he crossed the floor he passed this beautiful girl, looking upon her with the eye of lust. The first indication of his attitude

toward his victim is in the tall, good-natured Jim Gantt, friend of Mary. He asks Gantt: "You're pretty thick with Mary, aren't you?" It shows that he knew her and that he had his eye on her. What next? He wants to get rid of Gantt. How does he go about it? You have seen that previously he was bragging on Gantt, on Gantt's ability as a workman. But, just as soon as his eye is set upon the pretty little friend of Gantt, he sets plans to get rid of him. And, it comes up about a dollar. He says it was something about money, hoping to lead you, gentlemen, to believe that Gantt was a thief. He would not let Gantt go into the building because he was a thief. Didn't he know that this long-legged mountaineer was coming back at him? Sure, he knew it. And, they parted company at once. Gantt was fired. What was he accomplishing by this? He was getting rid of the only man on either floor—in the whole factory—who knew Mary Phagan, and who would raise a hand to protect her.

Then he sets about laying plans. And those plans!

You will notice that the defense has pitched its every effort entirely on Jim Conley. I don't blame them. He was like Stone Mountain is to some highways in its vicinity. They couldn't get by him. We could have left him out and have had an excellent chain of circumstantial evidence. Without Jim, though, the defense couldn't move — they couldn't budge. You have sat and seen the biggest legal battle ever fought in a court house between skillful intellect and a witness negro. You have seen brainy eloquence pitted against the slow, incomprehensible dialect of a negro. You have seen a trained and speedy mind battling with blunt ignorance. And, what was the result? At the end of three and a half days it came. That negro was asked questions about everything Rosser could conceive. His answers were hurried from the stenographer's notes and transcribed on typewriter. Then, they were hurled back into Conley's face. But, it was like water poured onto a mill wheel. They received the same answers, the same story.

It was because, gentlemen, the negro was telling the truth.

Truth is stronger than all the brains and ingenuity that can be collected in this whole town—this state, the world. How they did hate to give up the fight. They lost, and with the loss went the loss of their theory in whole.

When all was through, they were forced to sit and leave Jim's truth unscathed. How unfortunate! All they could say was that Jim had been a big liar. That is true. In his first two stories, he lied. But, if I had any comment on Jim Conley, it would be that if they had bored me as they bored him at police headquarters, they could have muddled me even more.

Suppose Frank's conduct in this case is shown as it has been. He is a smart man. There is no disputing that fact. He needn't have told you all the details on the stand of the amount of work he did that day. You can tell that he is smart, clever, ingenious.

Now, Jim, he comes back that Saturday morning by order of the brilliant Frank, his boss. There's no denial of this, so far. Other people tell you they have seen women enter the factory with men at suspicious hours. Jim tells you of watching for these folks. And there is this to reckon with: Providence has a way of revealing the truth at the final minute. At the eleventh hour we found two men yesterday who had been to the pencil factory at the noon Mary Phagan was murdered. They saw Jim Conley just as he tells you, sitting on the first floor, near the door where he watched for Frank. Mrs. White saw him, although she doesn't identify him perfectly. One thing true, she saw a negro in the position Jim tells us he was in. Now, for what purpose was he there? Waiting to do the same thing he had done before—to watch for his boss. They say he was drunk. Very well. But, did you notice how clearly he recited incidents and told the names of people he saw at the times they claim he was so drunk?

We are brought up to the time of the tragedy. Jim is still there. Everybody has gone, leaving him and Frank in the building. Frank knew that Mary Phagan was coming that

day, and he knew the hour. On the previous afternoon little Helen Ferguson, Mary's chum, had called for Mary's pay, and Frank had told her that Mary should come and get her own pay, breaking a rule of the plant in doing so. He arranges with Jim to hang around and make himself convenient. Jim takes his accustomed seat in the hallway. Parties come and go. Jim observes all that happens, he says nothing. Finally, Mary Phagen arrives, beautiful, innocent, coming in her blue frock and new hat and a ribbon around her hair. Without any thought of evil or foreboding of tragedy, she tripped into the building and up the stairs, going for $1.20. No explanation can come from Mary. The dead have no stories to tell. She went in a little after 12. She found Frank. He tells us that much from his own lips. He was there from 12 to 1. It's his own statement. What a statement!

There was Mary. Then, there was another little girl, Monteen Stover. He never knew Monteen was there, and he said he stayed in his office from 12 until after 1—never left. Monteen waited around for five minutes. Then she left. The result? There comes for the first time from the lips of Frank, the defendant, the admission that he might have gone to some other part of the building during this time—he didn't remember clearly.

Jim Conley, sitting faithfully downstairs, heard footsteps going toward the metal room. Then there came the sound of other footsteps, footsteps that pursued. There was no return of the first footsteps, and the footsteps that pursued tiptoed back from the metal room. Then Leo stamped a signal on the office floor.

I will be fair with Frank. When he followed the child back into the metal room, he didn't know that it would necessitate force to accomplish his purpose. I don't believe he originally had murder in his heart.

There was a scream. Jim Conley heard it. Just for the sake of knowing how harrowing it was, I wish you jurymen could hear a similar scream. It was poorly described by the

negro. He said it sounded as if a laugh was broken off into a shriek. He heard it break through the stillness of the hushed building. It was uncanny, but he sat faithfully on. He was under orders. He was to come on signal. That scream was no signal. Later, Frank would stamp on the the office floor.

This negro tells you that the white man killed the little girl. But, no! Frank was in his office, busy with his wonderful financial sheet. I will show you how he could have sat at his desk and heard this negro attack the little child who had come to draw her pay.

[*Mr. Hooper* turned to the diagram, showing the jury the nearness of the metal room to Frank's office, explaining his theory that nothing could have happened on the floor without being heard or seen by Frank.]

Mr. Frank, I will give you the benefit of all you deserve. When all is summed up, you were sitting only a few feet from the spot where a murder was committed, and you never raised a finger. Let me show you something else. When this thing was over there were two men and a woman upstairs who had to get out the building before the body was moved. It would be dangerous to leave it lying back in the metal room, staring hideously from unseeing eyes. Frank went upstairs and told the trio up there that if they were going, it was time for them to leave, as he was going to lock up the factory. He was in a hurry and told them so. Mrs. Arthur White, perceiving his evident hurry, hastened downstairs. When she reached the office, Frank, the man-in-a-hurry, was in his shirt sleeves, writing at his desk.

Why should I hang? What does that show? In the first place, his appreciation of a little girl of 14. Did it hurt him to knot the rope of cord around her neck, did it hurt him as he drew it tighter and tighter around the tender throat until the dim spark of life was choked extinct? To the contrary. It only excited him enough to ask himself the question "Why should I hang?" There come times when we all speak our true thoughts and sentiments. That was such a time.

Now, which is the more probable—that Jim heard this expression, or that he imagined the story? Did Jim know Frank had relatives in Brooklyn? Did Jim know there was such a thing as Brooklyn? Did he know they were rich? And Jim says, with the typical soul of Africa: "What's goin' to become of me?" Frank says, "I'll take care of you, for I'll write my mother a letter, so that she can help you." He asks Jim if he can write, and Jim tells him a little bit. He wasn't on his guard. He should have detected Frank's purpose. Frank was smart, Jim was dull. Frank dictated, Jim wrote.

Now, gentlemen, I suppose most of you are southern men, men who know the characteristics of the negro. Will you please tell me what idea this negro would have had to write these notes accusing a negro, and, just the same as saying, this was done by a negro who is a fool and who cannot write? It was foolish enough for the mighty brain of Frank to put the notes beside the body. The truth of the business is, that this looks like the only time the brainy Frank ever lost his head. Then, next comes the money. Frank pulls out his roll of bills, and says, "Jim, here's that $200." Jim is so overwhelmed that he doesn't notice the amount, but puts the roll in his pocket. Frank reflects. He need not waste the $200. Jim is as deep in the mire as he is in the mud. He recovers the money. "Let's see, Jim, if everything comes out all right, I'll return this money." He tells Jim that Jim has the goods to deliver. The body must be disposed of. That will be left to Jim. He depends on Jim's lust for the $200 to bring him back to the factory to burn the corpse of little Mary, the victim! Nobody else was expected by him that afternoon but Jim Conley and Newt Lee.

It makes no difference to me about how long it took Frank to go to lunch, the minute he put in here and the minute he put in there, about which there has been such a squabble in the evidence. That is aside from the point. The fact remains that at or about 3 o'clock he came back to the pencil factory to await the arrival of Jim Conley to burn that body! He

was expecting Jim Conley, and he also knew that Newt Lee was coming. Aye, there was the rub! He expected them both, and it depended upon which one arrived first as to how things would go. If Jim got there first and disposed of that body, all right; but suppose Newt Lee got there first! Then was the defendant in the position of Napoleon at the battle of Waterloo, when he wondered which army would arrive first, and knew that upon this question depended victory or defeat. The wrong army arrived, and Napoleon went down!

Newt Lee arrived at the pencil factory that afternoon, but where was Jim Conley? Yes, that's what the defendant asked himself, "Where is Jim Conley?" Jim Conley was getting that much-needed sleep after the exciting events he had gone through with. That's where Jim Conley was. Then was the defendant lost.

He sent Newt Lee away, with the last hope that Jim might yet turn up and burn the body as had been agreed upon. "Go out and have a good time, Newt," that's what the defendant told good old honest Newt Lee. He said, "It is not Newt Lee I want, it is Jim Conley. Go away, Newt, and stay until 6 o'clock. Give me two hours more." Two hours passed, and Jim Conley did not show up. He was taking that much-needed nap. Newt came back, and the game was up. He talked to Newt Lee about the night's work and started home.

Now, gentlemen of the jury, I want to call your attention to a very peculiar thing: As the defendant passed out of the factory door, he met Gantt, old long-legged Gantt, who was looking for his shoes. Witnesses testified that the defendant jumped back startled. Why? Think why? He wasn't afraid of Gantt. Gantt wouldn't hurt a flee. That wasn't the reason. He knew that Gantt knew Mary Phagan and had lived close to the family, and Frank thought that Gantt was looking for little Mary, who was missing from home and should have been back long ago. That's why he jumped back when he saw Gantt. He had called Gantt down about "setting up" to Mary, and had fired him over an argument about

who was going to pay a dollar or so. He didn't think that Gantt stole that paltry dollar. He expected him to ask where Mary Phagan was. That, gentlemen of the jury, is why he jumped back when he saw Gantt. But Gantt spoke to the defendant. He just said, "Howdy, Mr. Frank," The defendant felt relieved then. Gantt told him that he had left a pair of shoes in the factory and wanted to get them. But it won't do to let him go in that building now, thought the defendant. Suppose he should find out? He musn't go in there. So the defendant said that he thought he had seen a nigger sweeping Gantt's shoes out of the building. Then Gantt said he had two pairs of shoes in there, and that maybe the other pair wasn't swept out.

This was the last hope. What could he say to that? He had said that he saw the nigger sweeping out only one pair. In a few days this murder must be out, anyway. To keep Gantt out would arouse his suspicions. And this is what went on in the defendant's mind: "I'll let him in, but I'll guard him like a thief." And he said, "Newt, go with him." Strange to say, Gantt found both pairs of shoes, just where he said he had left them. Gentlemen, does that look like the defendant had seen a nigger sweeping them out? Does that look like the truth?

After he had let Gantt in the factory, what did he do? He called up the factory by phone, a thing that he never had done before. Why? Why did he do that thing? Gantt! Gantt! That's why! He wanted to know if Gantt had gone, and whether he was any the wiser. He couldn't rest until he knew this. This Banquo's ghost of a Gantt was haunting him. But when he knew that Gantt was safely gone and everything was all right, he was in a fine humor then. He could laugh and talk. He could sit down in the house with his wife and read baseball in the newspaper. He could laugh and try playfully to break up a card game. He felt fine and relieved. As glad and free as a school boy! Old long-legged Gannt was gone, and everything was all right!

Now, about Newt Lee. I don't want to thresh out all the

with a lot of things piled on top of it, he found a bloody shirt! How did it get there? Newt Lee accounts for his time Sunday. No suspicion attaches to Newt Lee. He is a free man. How did that bloody shirt get there? It had to be planted. Gentlemen, it was planted! Here are the two propositions, gentlemen. If Newt Lee was to be made the goat, suspicion had to be directed to him. Somebody had to plant that suspicion.

He would sacrifice Newt Lee that he might live!

The Bible says, "What will not a man give for his life?" He was willing to give the life of Newt Lee that his own life might be spared. He was willing to give the life of Gantt that he might live. Was not Gantt arrested a few days after?

But not once at that time did he think of giving the life of Jim Conley. But somebody found Jim Conley washing a shirt to go to the trial, and there was where Jim got into trouble.

But Frank didn't try to fix it on Jim then. He waited until Newt had failed, and all else had failed, except the suspicion which rested upon himself. Then he turned on Jim Conley.

I call your attention, gentlemen of the jury, to another peculiar thing: Weeks after the murder, and after the factory had been searched, a big, bloody stick was found by shrewd Pinkerton detectives, who can find anything—even an elephant, if it gets in the way. They also found a piece of envelope. But, fortunately, they showed this to Mr. Coleman, who said that Mary had received but $1.20 and that the figure "5" on the envelope had no business there. And so, it was rubbed out. Besides the shirt, then, we find the club and the pay envelope. Another very peculiar thing is about this man named Mincey. Conley was asked, "Didn't you confess to Mincey that you were the man that killed the girl?" Conley said, "No." That question was asked, gentlemen, as a foundation upon which to introduce Mincey. Where is Mincey? He is the man who could clear it all up.

He is the man about whom it appeared that the whole fight would center. If he could convince you that Jim confessed the murder to him, that would let Frank out! Yet where is Mincey? Gentlemen, this has been a long testimony which you have had to sit through, and I do not wish to take up any more of your time than necessary.

Gentlemen, the only belief required of you is the same sort of belief that you would have upon the street, at your places of business, or in your homes, and on this belief you are to act. Simply use your common sense in the jury box. I thank you.

MR. ARNOLD, FOR THE PRISONER.

Mr. Arnold. Gentlemen of the Jury: We are all to be congratulated that this case is drawing to a close. We have all suffered here from trying a long and complicated case at the heated term of the year. It has been a case that has taken so much effort and so much concentration and so much time, and the quarters here are so poor, that it has been particularly hard on you members of the jury who are practically in custody while the case is going on. I know it's hard on a jury, to be kept confined this way, but it is necessary that they be segregated and set apart where they will get no impression at home nor on the street. The members of the jury are in a sense set apart on a mountain, where, far removed from the passion and heat of the plain, calmness rules them and they can judge a case on its merits.

My friend Hooper said a funny thing here a while ago. I don't think he meant what he said, however. Mr. Hooper said that the men in the jury box are not different from the men on the street. Your Honor, I'm learning something every day, and I certainly learned something today, if that's true.

Mr. Hooper. Mr. Arnold evidently mistakes my meaning, which I thought I made clear. I stated that the men in the jury box were like they would be on the street in the fact that in making up their minds about the guilt or innocence of the accused they must use the same common sense that they would if they were not part of the court.

[*Mr. Arnold* next described the horrible crime that had been committed that afternoon or night in the National Pencil Company's dark basement. He dwelt on the effect of the crime upon the people of Atlanta and of how high feeling ran and still runs, and of the omnipresent desire for the death of the man who committed the crime.]

There are fellows like that street car man, Kendley, the one who villified this defendant here and cried for him to be lynched, and shouted that he was guilty until he made himself a nuisance on the cars he ran. Why, I can hardly realize that a man holding a position as responsible as that of a motorman and a man with certain police powers and the discretion necessary to guide a car through the crowded city streets would give way to passion and prejudice like that. It was a type of man like Kendley who said he did not know for sure whether those negroes hanged in Decatur for the shooting of the street car men were guilty, but he was glad they were hung, as some negroes ought to be hanged for the crime. He's the same sort of a man who believes that there ought to be a hanging because that innocent little girl was murdered, and who would like to see this Jew here hang because somebody ought to hang for it.

I'll tell you right now, if Frank hadn't been a Jew there would never have been any prosecution against him. I'm asking my own people to turn him loose, asking them to do justice to a Jew, and I'm not a Jew, but I would rather die before doing injustice to a Jew.

This case has just been built up by degrees; they have a monstrous perjurer here in the form of this Jim Conley against Frank. You know what sort of a man Conley is, and you know that up to the time the murder was committed no one ever heard a word against Frank. Villainy like this charged to him does not crop out in a day. There are long mutterings of it for years before. There are only a few who have ever said anything against Frank. I want to call your attention later to the class of their witnesses and the class of ours. A few floaters around the factory, out of the hundreds

who have worked there in the plant three or four years, have been induced to come up here and swear that Frank has not a good character, but the decent employees down there have sworn to his good character. Look at the jail birds they brought up here, the very dregs of humanity, men and women who have disgraced themselves and who now have come and tried to swear away the life of an innocent man.

I know that you members of the jury are impartial. That's the only reason why you are here, and I'm going to strip the state's case bare for you, if I have the strength to last to do it. They have got to show Frank guilty of one thing before you can convict him; they've got to show that he is guilty of the murder, no matter what else they show about him. You are trying him solely for the murder, and there must be no chance that anyone else could just as likely be guilty. If the jury sees that there is just as good a chance that Conley can be guilty, then they must turn Frank loose

Now, you can see how in this case the detectives were put to it to lay the crime on somebody. First, it was Lee, and then it was Gantt, and various people came in and declared they had seen the girl alive late Saturday night and at other times, and no one knew what to do. Well, suspicion turned away from Gantt, and in a little while it turned away from Lee. Now, I don't believe that Lee is guilty of the crime, but I do believe that he knows a lot more about the crime than he told. He knows about those letters and he found that body a lot sooner than he said he did.

Oh, well, the whole case is a mystery, a deep mystery, but there is one thing pretty plain, and that is that whoever wrote those notes committed the crime. Those notes certainly had some connection with the murder, and whoever wrote those notes committed the crime.

Well, they put Newt Lee through the third degree and the fourth degree, and maybe a few others. That's the way, you know, they got this affidavit from the poor negro woman, Minola McKnight. Why, just the other day the supreme court handed down a decision in which it referred to the third

degree methods of the police and detectives in words that burned.

Well, they used those methods with Jim Conley. My friend, Hooper, said nothing held Conley to the witness chair here but the truth, but I tell you that the fear of a broken neck held him there. I think this decision about the third degree was handed down with Conley's case in mind. I'm going to show this Conley business up before I get through. I'm going to show that this entire case is the greatest frame-up in the history of the state.

My friend Hooper remarked something about circumstantial evidence, and how powerful it frequently was. He forgot to say that the circumstances, in every case, must invariably be proved by witnesses. History contains a long record of circumstantial evidence, and I once had a book on the subject which dwelt on such cases, most all of which sickens the man who reads them. Horrible mistakes have been made by circumstantial evidence—more so than by any other kind.[1]

Hooper says, "Suppose Frank didn't kill the girl, and Jim Conley did, wasn't it Frank's duty to protect her" He was taking the position that if Jim went back there and killed her, Frank could not help but know about the murder. Which position, I think, is quite absurd. Take this hypothesis, then, of Mr. Hooper's. If Jim saw the girl go up and went back and killed her, would he have taken the body down the elevator at that time? Wouldn't he have waited until Frank and White and Denham, and Mrs. White and all others were out of the building? I think so. But there's not a possibility of the girl having been killed on the second floor. Hooper smells a plot, and says Frank has his eye on the little girl who was killed. The crime isn't an act of a civilized

[1] Here Mr. Arnold cited the Durant case in San Francisco, the Hampton case in England, and the Dreyfus case in France as instances of mistakes of circumstantial evidence. In the Dreyfus case he declared it was purely persecution of the Jew. The hideousness of the murder itself was not as savage, he asserted, as the feeling to convict this man. But the savagery and venom is there just the same, and it is a case very much on the order of Dreyfus.

man—it's the crime of a cannibal, a man-eater. Hooper is hard-pressed and wants to get up a plot—he sees he has to get up something. He forms his plot from Jim Conley's story.

They say that on Friday, Frank knew he was going to make an attack of some sort on Mary Phagan. The plot thickens. Of all the wild things I have ever heard, that is the wildest. It is ridiculous. Mary Phagan worked in the pencil factory for months, and all the evidence they have produced that Frank ever associated with her—ever knew her—is the story of weasley little Willie Turner, who can't even describe the little girl who was killed.

A little further on in his story, Jim is beginning the plot. They used him to corroborate everything as they advised. Jim is laying the foundation for the plot. What is it—this plot? Only that on Friday Frank was planning to commit some kind of assault upon Mary Phagan. Jim was their tool. Even Scott swears that when he told Jim that Jim's story didn't fit, Jim very obligingly adapted it to suit his defense. He was scrupulous about things like that. He was quite considerate. Certainly. He had his own neck to save.

Jim undertook to show that Frank had an engagement with some woman at the pencil factory that Saturday morning. There is no pretense that another woman is mixed up in the case. No one would argue that he planned to meet and assault this innocent little girl who was killed. Who but God would know whether she was coming for her pay that Friday afternoon or the next Saturday? Are we stark idiots? Can't we divine some things?

They's got a girl named Ferguson, who says she went for Mary Phagan's pay on the Friday before she was killed, and that Frank wouldn't give it to her. It is the wildest theory on earth, and it fits nothing. It is a strained conspiracy. Frank, to show you I am correct, had nothing whatever to do with paying off on Friday. Schiff did it all. And little Magnolia Kennedy, Helen Ferguson's best friend, says she was with Helen when Helen went to draw her pay, and that Helen

never said a word about Mary's envelope. There's your conspiracy, with Jim Conley's story as its foundation. It's too thin. It's preposterous.

Then my friend Hooper says Frank discharged Gantt because he saw Gantt talking to Mary Phagan. If you convict men on such distorted evidence as this, why you'd be hanging men perpetually. Gantt, in the first place, doesn't come into this case in any good light. It is ridiculously absurd to bring his discharge into this plot of the defense. Why, even Grace Hicks, who worked with Mary Phagan, and who is a sister-in-law of Boots Rogers, says that Frank did not know the little girl.

Hooper also says that bad things are going on in the pencil factory, and that it is natural for men to cast about for girls in such environments. We are not trying this case on whether you or I or Frank had been perfect in the past. This is a case of murder. Let him who is without sin cast the first stone. I say this much, and that is that there has been as little evidence of such conditions in this plant as any other of its kind you can find in the city. They have produced some, of course, but it is an easy matter to locate some ten or twelve disgruntled ex-employees who are vengeful enough to swear against their former superintendent, even though they don't know him except by sight.

I want to ask this much: Could Frank have remained at the head of this concern if he had been as loose morally as the state has striven to show? If he had carried on with the girls of the place as my friend alleged, wouldn't the entire working force have been demoralized, ruined? He may have looked into this dressing room, as the little Jackson girl says, but, if he did, it was done to see that the girls weren't loitering. There were no lavatories, no toilets, no baths in these dressing rooms. The girls only changed their top garments. He wouldn't have seen much if he had peered into the place. You can go to Piedmont park any day and see girls and women with a whole lot less on their persons. And to the shows any night you can see the actresses with almost nothing

on. Everything brought against Frank was some act he did openly and in broad daylight, and an act against which no kick was made.

The trouble with Hooper is that he sees a bear in every bush. He sees a plot in this because Frank told Jim Conley to come back Saturday morning. The office that day was filled with persons throughout the day. How could he know when Mary Phagan was coming or how many persons would be in the place when she arrived?

This crime is the hideous act of a negro who would ravish a ten-year-old girl the same as he would ravish a woman of years. It isn't a white man's crime. It's the crime of a beast—a low, savage beast!

Now, back to the case. There is an explorer in the pencil factory by the name of Barrett—I call him Christopher Columbus Barrett purely for his penchant for finding things. Mr. Barrett discovered the blood spots in the place where Chief Beavers, Chief Lanford and Mr. Black and Mr. Starnes had searched on the Sunday of the discovery. They found nothing of the sort. Barrett discovered the stains after he had proclaimed to the whole second floor that he was going to get the $4,000 reward if Mr. Frank was convicted. Now, you talk about plants! If this doesn't look mighty funny that a man expecting a reward would find blood spots in a place that has been scoured by detectives, I don't know what does. Four chips of this flooring were chiseled from this flooring where these spots were found. The floor was an inch deep in dirt and grease. Victims of accidents had passed by the spot with bleeding fingers and hands. If a drop of blood had ever fallen there, a chemist could find it four years later. Their contention is that all the big spots were undiluted blood. Yet, let's see how much blood Dr. Claude Smith found on the chips. Probably five corpuscles, that's all, and that's what he testified here at the trial. My recollection is that one single drop of blood contains 8,000 corpuscles. And, he found these corpuscles on only one chip. I say that half of the blood had been on the floor two or three years. The stain on

all chips but one were not blood. Dorsey's own doctors have put him where he can't wriggle—his own evidence hampers him! They found blood spots on a certain spot and then had Jim adapt his story accordingly. They had him put the finding of the body near the blood spots, and had him drop it right where the spots were found.

It stands to reason that if a girl had been wounded on the lathing machine, there would have been blood in the vicinity of the machine. Yet, there was no blood in that place, and neither was there any where the body was said to have been found by Conley. The case doesn't fit. It's flimsy. And, this white machine oil that they've raised such a rumpus over. It was put on the floor as a cheap, common plant to make it appear as though someone had put it there in an effort to hide the blood spots. The two spots of blood and the strands of hair are the only evidence that the prosecution has that the girl was killed on the second floor.

Now, about these strands of hair. Barrett, the explorer, says he found four or five strands on the lathing machine. I don't know whether he did or not. They've never been produced. I've never seen them. But, it's probable, for just beyond the lathing machine, right in the path of a draft that blows in from the window, is a gas jet used by the girls in curling and primping their hair. It's very probable that strands of hair have been blown from this jet to the lathing machine.

The detectives say that Frank is a crafty, cunning criminal, when deep down in their heart of hearts they know good and well that their case is built against him purely because he was honest enough to admit having seen her that day. Had he been a criminal, he never would have told about seeing her and would have replaced her envelope in the desk, saying she had never called for her pay.

I believe that a majority of women are good. The state jumped on poor Daisy Hopkins. I don't contend, now, mind you, that she is a paragon of virtue. But there are men who were put up by the state who are no better than she. For in-

stance, this Dalton, who says openly that he went into the basement with Daisy. I don't believe he ever did, but, in such a case, he slipped in. There are some fallen women who can tell the truth. They have characteristics like all other types. We put her on the stand to prove Dalton a liar, and she did it. Now, gentlemen, don't you think the prosecution is hard pressed when they put up such a character as Dalton? They say he has reformed. A man with thievery in his soul never reforms. Drunkards do, and men with bad habits, but thieves? No. Would you convict a man like Frank on the word of a perjurer like Dalton?

Now, I'm coming back to Jim Conley. The whole case centers around him. Mr. Hooper argues well on that part. At the outset of the case, the suspicion pointed to Frank merely because he was the only man in the building. It never cropped out for weeks that anyone else was on the first floor. The detectives put their efforts on Frank because he admitted having seen the girl. They have let their zeal run away with them in this case, and it is tragic. They are proud whenever they get a prisoner who will tell something. The humbler the victim the worse is the case. Such evidence comes with the stamp of untruth on its face.

Jim Conley was telling his story to save his neck, and the detectives were happy listeners. If there is one thing for which a negro is capable it is for telling a story in detail. It is the same with children. Both have vivid imaginations. And a negro is also the best mimic in the world. He can imitate anybody. Jim Conley, as he lay in his cell and read the papers and talked with the detectives, conjured up his wonderful story, and laid the crime on Frank, because the detectives had laid it there and were helping him do the same.

Now, Brother Hooper waves the bloody shirt in our face. It was found, Monday or Tuesday, in Newt Lee's house, while Detectives Black and Scott were giving Cain to poor old man Newt Lee. I don't doubt for a minute that they knew it was out there when they started out after it. I can't say

they planted it, but it does look suspicious. Don't ask us about a planted shirt. Ask Scott and Black.

The first thing that points to Conley's guilt is his original denial that he could write. Why did he deny it? Why? I don't suppose much was thought of it when Jim said he couldn't write, because there are plenty of negroes who are in the same fix. But later, when they found he could, and found that his script compared perfectly with the murder notes, they went right on accusing Frank. Not in criminal annals was there a better chance to lay at the door of another man a crime than Jim Conley had.

You see, there is a reason to all things. The detective department had many reasons to push the case against Frank. He was a man of position and culture. They were afraid that someone, unless they pushed the case to the jumping off place, would accuse them of trying to shield him. They are afraid of public and sentiment, and do not want to combat it, so, in such cases, they invariably follow the line of least resistance.

[Reading Conley's statement, *Mr. Arnold* pointed out the use of words, which he declared no negro would naturally have used. These were long words with many syllables in them. They said that Conley used so much detail in his statements that he could not have been lying! He then read parts of statements which Conley had repudiated as willful lies and pointed out the wealth of detail with which they were filled. And yet they say he couldn't fabricate so much detail! Oh, he is smart! He then read the statement of May 24, in which Conley admitted writing the notes. In this he shows three different times at which Conley stated he wrote the notes, these being early in the morning, at 12:04 and at 3 p. m.]

The statements were not genuinely Conley's. Take the word "negro." The first word that a nigger learns to spell correctly is negro, and he always takes particular pains to spell it n-e-g-r-o. He knows how to spell it. Listen to the statement. He says that at first he spelled the word "negros," but that Frank did not want the "s" on it and told him to rub it out, which he did. Then he says that he wrote the word over.

Look at the notes. He was treed about those notes, and he

had to tell a lie and put upon someone the burden of instructing him to write them. The first statement about them was a blunt lie—a lie in its incipiency. He said he wrote the notes on Friday. This was untrue, and unreasonable and he saw it. Frank could not have known anything of an intended murder on Friday from any viewpoint you might take, and therefore he could not have made Conley write them on Friday. Ah, gentlemen of the jury, I tell you these people had a great find when they got this admission from Conley! If Conley had stayed over there in the Tower with Uncle Wheeler Mangum he would have told the truth long ago. There's where he should have stayed, with Wheeler Mangum.

My good friend, Dorsey, is all right. I like him. But he should not have walked hand in glove with the detectives. There's where he went wrong. My good old friend, Charlie Hill would not have done that. He would have let the nigger stay in the jail with Uncle Wheeler. I like Dorsey. He simply made a mistake by joining in the hunt, in becoming a part of the chase. The solicitor should be little short of as fair as the judge himself. But he's young and lacks the experience. He will probably know better in the future. Dorsey did this: He went to the judge and got the nigger moved from the jail to the police station. The judge simply said, "Whatever you say is all right."

Now, I'm going to show you how John Black got the statement of Conley changed. I am going to give you a demonstration. I have learned some things in this case about getting evidence!

They say that Frank cut Conley loose and he decided to tell the truth. Conley is a wretch with a long criminal record. Gentlemen, how can they expect what he says to be believed against the statement of Leo M. Frank? They say Conley can't lie about detail. Here are four pages, all of which he himself admits are lies. They are about every saloon on Peters street, saloons to which he went, his shooting craps, his buying beer and all the ways in which he spent

a morning. There is detail enough, and he admits that they are lies. Now, in his third statement, that of May 28, he changes the time of writing the letters from Friday to Saturday. Here are two pages of what he said, all of which he afterwards said were lies. He says that he made the statement that he wrote the notes on Friday in order to divert suspicion from his being connected with the murder which happened on Saturday. He also says that this is his final and true statement. God only knows how many statements he will make. He said he made the statement voluntarily and truthfully without promise of reward, and that he is telling the truth and the whole truth. He said in his statement that he never went to the building on Saturday. Yet we know that he was lurking in the building all the morning on the day of the murder. We know that he watched every girl that walked into that building so closely that he could tell you the spots on their dresses. We know that he was drunk, or had enough liquor in him to fire his blood.

I know why he wouldn't admit being in that building on Saturday. He had guilt on his soul, and he didn't want it to be known that he was here on Saturday. That's why!

When they pinned him down, what did he do? He says that he was watching for Frank. My God, wasn't he a watchman! He said that he heard Frank and Mary Phagan walking upstairs, and that he heard Mary Phagan scream, and that immediately after hearing the scream he let Monteen Stover into the building.

Why, they even have him saying that he watched for Frank, when another concern was using the very floor space in which Frank's office was located, and you know they wouldn't submit to anything like that. Look again! He says that Mr. Frank said, "Jim, can you write?" What a lie! He admitted that he had been writing for Frank for two years. It's awful to have to argue about a thing like this, gentlemen! You will remember Hooper said, "How foolish of Conley to write these notes!" How much more foolish, I say, of Frank to do it!

I don't think that Newt killed the girl, but I believe he discovered the body some time before he notified the police. Newt's a good nigger.

Scott said that it took Conley six minutes to write a part of one note. Conley said that he wrote the notes three times.

They say that nigger couldn't lie. Gentlemen, if there is any one thing that nigger can do, it is to lie. As my good old friend, Charlie Hill, would say, "Put him in a hopper and he'll drip lye!"

He was trying to prove an alibi for himself when he said that he was not in the factory on Saturday and told all the things that he did elsewhere on that day. But we know that the wretch was lurking in the factory all of Saturday morning. Further, he swore that while he was in Frank's office he heard someone approaching, and Mr. Frank cried out, "Gee! Here come Corinthia Hall and Emma Clarke!" and that Frank shut him up in a wardrobe until they left. According to Conley, they came into the factory between 12 and 1 o'clock, when as a matter of fact, we know that they came between 11 and 12. And as for his being able to fabricate the details of his statement—why, he knew every inch of that building from top to bottom! Hadn't he been sweeping and cleaning it for a long time? With this knowledge of the building, he naturally had no trouble in his pantomime after he had formed his story. The miserable wretch has Frank hiding him in the wardrobe when Emma Clarke came in after the murder, when it has been proved that she came there and left before Mary Phagan ever entered the building on that day.

They saw where they were wrong in that statement, and they made Conley change it on the stand. They made him say, "I thought it was them." They knew that that story wouldn't fit.

Do you remember, how eagerly Conley took the papers from the girls at the factory? And do you remember how for four or five days the papers were full of the fact that Frank's home was in Brooklyn, and that his relatives were reported to be wealthy? Conley didn't have to go far to get material

for that statement he put in Frank's mouth. It so happened, though, that Frank really did not have rich relatives in Brooklyn. His mother testified that his father was in ill health, and had but moderate means and that his sister worked in New York for her living.

Gentlemen, am I living or dreaming, that I have to argue such points as these? This is what you've got to do: You've got to swallow every word that Conley has said—feathers and all, or you've got to believe none of it. How are you going to pick out of such a pack of lies as these what you will believe and what you will not? Yet, this is what the prosecution has based the case upon. If this fails, all fails.

And do you remember about the watch, where Conley said that Frank asked him, "Why do you want to buy a watch for your wife? My big, fat wife wanted me to buy her an automobile, but I wouldn't do it!" Do you believe that, gentlemen of the jury?

I tell you that they have mistreated this poor woman terribly. They have insinuated that she would not come to the tower to see Frank—had deserted him. When we know that she stayed away from the jail at Frank's own request because he did not want to submit her to the humiliation of seeing him locked up and to the vulgar gaze of the morbid and to the cameras of the newspaper men. The most awful thing in the whole case is the way this family has been mistreated! The way they invaded Frank's home and manipulated his servants. I deny that the people who did this are representative of the 175,000 people of Fulton county! We are a fair people, and we are a chivalrous people. Such acts as these are not in our natures.

Conley next changes the time of the writing of the notes to Saturday, but denies knowledge of the murder. That, of course, did not satisfy these gentlemen, and they went back to him. They knew he was dodging incrimination. So they had him to change the statement again. Scott and other detectives spent six hours at the time with Conley on occasions,

and used profanity and worried him to get a confession. Hooper thinks that we have to break down Conley's testimony on the stand, but there is no such ruling. You can't tell when to believe him, he has lied so much. Scott says the detectives went over the testimony with Dorsey. There is where my friend got into it. They grilled Conley for six hours, trying to impress on him the fact that Frank would not have written the notes on Friday. They wanted another statement. He insisted that he had no other statement to make, but he did change the time of the writing of the notes from Friday to Saturday. This shows, gentlemen, as clearly as anything can show, how they got Conley's statements. In the statement of May 29, they had nothing from Jim Conley about his knowledge of the killing of the little girl, and the negro merely said that Frank had told him something about the girl having received a fall and about his helping Frank to hide the body.

Oh, Conley, we are going to have you tell enough to have you convict Frank and yet keep yourself clear. That's a smart negro, that Conley. And you notice how the state bragged on him because he stood up under the cross-examination of Colonel Rosser. Well, that negro's been well versed in law. Scott and Black and Starnes drilled him; they gave him the broad hints.

We came here to go to trial, and knew nothing of the negro's claim to seeing the cord around the little girl's neck, or of his claim of seeing Lemmie Quinn go into the factory, or of a score of other things. Yet, Conley was then telling the truth, he said, and he had thrown Frank aside. Oh, he was no longer shielding Frank, and yet he didn't tell it all when he said he was telling the whole truth. Well, Conley had a revelation, you know. My friend Dorsey visited with him seven times. And my friend, Jim Starnes, and my Irish friend, Patrick Campbell, they visited him, and on each visit Conley saw new light. Well, I guess they showed him things and other things. Does Jim tell a thing because it's the truth, gentlemen of the jury, or because it fits into something that another witness has told? Scott says they told him things

that fitted. And Conley changed things every time he had a visit from Dorsey and the detectives. Are you going to hang a man on that? Gentlemen, it's foolish for me to have to argue such a thing.

The man that wrote those murder notes is the man who killed that girl. Prove that man was there and that he wrote the notes and you know who killed the girl. Well, Conley acknowledges he wrote the notes and witnesses have proved he was there and he admits that, too. That negro was in the building near the elevator shaft; it took but two steps for him to grab that little girl's mesh bag. She probably held on to it and struggled with him. A moment later he had struck her in the eye and she had fallen. It is the work of a moment for Conley to throw her down the elevator shaft.

Isn't it more probable that the story I have outlined is true than the one that Conley tells on Frank? Suppose Conley were now under indictment and Frank out, how long would such a story against Frank stand the pressure?

In the statement of May 29 there are any number of things that are not told of which later were told on the stand. In the May 29 statement Conley never told of seeing Mary Phagan enter; he never told of seeing Monteen Stover enter, nor of seeing Lemmie Quinn enter; now he tells of having seen all of them enter. Don't you see how they just made it to fit witnesses and what the witnesses would swear? It was, "Here, Conley, swear that Quinn came up, swear that the dead girl came up, and swear that Miss Stover came up; they all did, and it's true, swear to it!" And Conley would say, "All right, boss, Ah reckon they did." And it was "Conley, how did you fail to hear that girl go into the metal room? We know she went there, because by our blood and hair we have proved she was killed there," and the poor negro thought a minute, and then he said, "Yes, boss, I heard her go in." The state's representatives had put it into the negro's head to swear he heard Frank go in with her, and that he heard Frank come tiptoeing out later, and that by that method they made Conley swear that Frank was a moral pervert. Now, I don't know

that they told Conley to swear to this and to swear to that, but they made the suggestions, and Conley knew whom he had to please. He knew that when he pleased the detectives that the rope knot around his neck grew looser. In the same way they made Conley swear about Dalton, and in the same way about Daisy Hopkins. They didn't ask him about the mesh bag. They forgot that until Conley got on the stand. That mesh bag and that pay envelope furnish the true motive for this crime, too, and if the girl was ravished, Conley did it after he had robbed her and thrown her body into the basement. Well, they got Conley on the stand, and my friend Dorsey here asked Conley about the mesh bag, and he said, yes, Frank had put it in his safe. That was the crowning lie of all!

Well, they've gone on this way, adding one thing and another thing. They wouldn't let Conley out of jail; they had their own reasons for that, and yet I never heard that old man over there (pointing to the sheriff) called dishonest. He runs his jail in a way to protect the innocent and not to convict them in this jail.

Gentlemen, right here a little girl was murdered, and it's a terrible crime. The Phagan tragedy, the crime that stirred Atlanta as none other ever did.

We have already got in court the man who wrote those notes, and the man who by his own confession was there; the man who robbed her, and, gentlemen, why go further in seeking the murderer than the black brute who sat there by the elevator shaft? The man who sat by that elevator shaft is the man who committed the crime. He was full of passion and lust; he had drunk of mean whiskey, and he wanted money at first to buy more whiskey.

[*Mr. Arnold* asked the sheriff to unwrap a chart which had previously been brought into court. It proved to be a chronological chart of Frank's alleged movements on Saturday, April 26, the day of the crime, and Mr. Arnold announced to the jury that he would prove by the chart that it was a physical impossibility for Frank to have committed the crime.]

Every word on that chart is taken from the evidence, and it will show you that Frank did not have time to commit the crime charged to him. The state has wriggled a lot in this affair; they put up little George Epps, and he swore that he and Mary Phagan got to town about seven after twelve, and then they used other witnesses, and my friend Dorsey tried to boot the Epps boy's evidence aside as though it were nothing. The two street car men, Hollis and Mathews, say that Mary Phagan got to Forsyth and Marietta at five or six minutes after twelve, and they stuck to it, despite every attempt to bulldoze them, and then Mathews, who rode on the car to Whitehall and Mitchell, says that Mary Phagan rode around with him to Broad and Hunter streets before she got off.

Well, the state put up McCoy, the man who never got his watch out of soak until about the time he was called as a witness, and they had him swear that he looked at his watch at Walton and Forsyth (and he never had any watch), and it was 12 o'clock exactly, and then he walked down the street and saw Mary Phagan on her way to the factory. Now, I don't believe McCoy ever saw Mary Phagan. Epps may have seen her, but the State apparently calls him a liar, when they introduce other testimony to show a change of time to what he swore to. It's certain those two street car men who knew the girl, saw her, but the state comes in with the watchless McCoy and Kendley, the Jew-hater, and try to advance new theories about the time and different ones from what their own witness had sworn to. Well, we have enough to prove the time, all right; we have the street car schedule, the statement of Hollis and Mathews and of George Epps, the state's own witness.

The next thing is, how long did it take Conley to go through with what he claims happened from the time he went into Frank's office and was told to get the body until he left the factory. According to Conley's own statement, he started at four minutes to 1 o'clock and got through at 1:30 o'clock, making 34 minutes in all.

Harlee Branch says that he was there when the detectives made Conley go through with what he claimed took place, and that he started then at 12:17, and by Mr. Branch's figures, it took Conley 50 minutes to complete the motions. Well, the state has attacked nearly everybody we have brought into this case, but they didn't attack Dr. William Owen, and he showed by his experiments that Conley could not have gone through those motions in 34 minutes.

Jim Conley declared that he started at 4 minutes to 1 o'clock to get the body, and that he and Frank left at 1:30. If we ever pinned the negro down to anything, we did to that, and we have shown that he could not have done all that in 34 minutes.

Away with your filth and your dirty, shameful evidence of perversion; your low street gossip, and come back to the time—the time-element in the case.

Now, I don't believe the little Stover girl ever went into the inner office. She was a sweet, innocent, timid little girl, and she just peeped into the office from the outer one, and if Frank was in there, the safe door hid him from her view, or if he was not there, he might have stepped out for just a moment.

Oh, my friend, Dorsey, he stops clocks and he changes schedules, and he even changes a man's whole physical make-up, and he's almost changed the course of time in an effort to get Frank convicted.

Oh, I hate to think of little Mary Phagan in this. I hate to think that such a sweet, pure, good little girl as she was, with never a breath of anything wrong whispered against her, should have her memory polluted with such rotten evidence against an innocent man. Well, Mary Phagan entered the factory at approximately 12 minutes after 12, and did you ever stop to think that it was Frank who told them that the girl entered the office when she entered it? If he had killed her he would have just slipped her pay envelope back in the safe and declared that he never saw her that day at all, and then no one could have ever explained how she got into that

basement. But Frank couldn't know that there was hatred enough left in this country against his race to bring such a hideous charge against him. Well, the little girl entered, and she got her pay and asked about the metal and then she left, but, there was a black spider waiting down there near the elevator shaft, a great passionate, lustful animal, full of mean whiskey and wanting money with which to buy more whiskey. He was as full of vile lust as he was of the passion for more whiskey, and the negro (and there are a thousand of them in Atlanta who would assault a white woman if they had the chance and knew they wouldn't get caught) robbed her and struck her and threw her body down the shaft, and later he carried it back, and maybe, if she was alive, when he came back, he committed a worse crime, and then he put the cord around her neck and left the body there.

Do you suppose Frank would have gone out at 1:20 o'clock and left that body in the basement and those two men, White and Denham, at work upstairs? Do you suppose an intelligent man like Frank would have risked running that elevator, like Conley says he did, with the rest of the machinery of the factory shut off and nothing to prevent those men up there hearing him?

Well, Frank says he left the factory at 1 o'clock, and Conley says he left there at 1:30. Now, there's a little girl, who tried the week before to get a job as stenographer in Frank's office, who was standing at Whitehall and Alabama streets, and saw Frank at ten minutes after 1. Did she lie? Well, Dorsey didn't try to show it, and according to Dorsey, everybody lied except Conley and Dalton and Albert McKnight. This little girl says she knows it was Frank, because Professor Briscoe had introduced her to him the week before, and she knows the time of day because she had looked at a clock, as she had an engagement to meet another little girl. That stamps your Conley story a lie blacker than hell! Then, Mrs. Levy, she's a Jew, but she's telling the truth; she was looking for her son to come home, and she saw Frank get off the car at his home corner, and she looked at her clock and saw it was

1:20. Then, Mrs. Selig and Mr. Selig swore on the stand that they knew he came in at 1:20.

Oh, of course, Dorsey says they are Frank's parents and wretched liars when they say they saw him come in at 1:20. There's no one in this case that can tell the truth but Conley, Dalton and Albert McKnight. They are the lowest dregs and jail-birds, and all that, but they are the only ones who know how to tell the truth! Well, now Albert says he was there at the Selig home when Frank came in; of course he is lying, for his wife and the Seligs prove that, but he's the state's witness and he says Frank got there at 1:30, and thus he brands Conley's story about Frank's leaving the factory at 1:30 a lie. Well, along the same lines, Albert says Frank didn't eat and that he was nervous, and Albert says he learned all this by looking into a mirror in the dining room, and seeing Frank's reflection. Then Albert caps the climax to his series of lies by having Frank board the car for town at Pulliam street and Glenn.

Now as to the affidavit signed by Minola McKnight, the cook for Mr. and Mrs. Emil Selig. How would you feel, gentlemen of the jury, if your cook, who had done no wrong and for whom no warrant had been issued, and from whom the solicitor had already got a statement, was to be locked up? Well, they got that wretched husband of Minola's by means of Craven and Pickett, two men seeking a reward, and then they got Minola, and they said to her, "Oh, Minola, why don't you tell the truth like Albert's telling it?"

They had no warrant when they locked this woman up. Starnes was guilty of a crime when he locked that woman up without a warrant, and Dorsey was, too, if he had anything to do with it. Now, George Gordon, Minola's lawyer, says that he asked Dorsey about getting the woman out, and Dorsey replied, "I'm afraid to give my consent to turning her loose; I might get in bad with the detective department." That's the way you men got evidence, was it?

Miss Rebecca Carson, a forewoman of the National Pencil factory, swore Frank had a good character. The state had

introduced witnesses who swore that the woman and Frank had gone into the woman's dressing room when no one was around. I brand it a culmination of all lies when this woman was attacked. Frank had declared her to be a perfect lady with no shadow of suspicion against her.

Well, Frank went on back to the factory that afternoon when he had eaten his lunch, and he started in and made out the financial sheet. I don't reckon he could have done that if he had just committed a murder, particularly when the state says he was so nervous the next morning that he shook and trembled.

Then, the state says Frank wouldn't look at the corpse. But who said he didn't? Nobody. Why, Gheesling and Black didn't swear to that.

Now, gentlemen, I've about finished this chapter, and I know it's been long and hard on you and I know it's been hard on me, too; I'm almost broken down, but it means a lot to that man over there. It means a lot to him, and don't forget that. This case has been made up of just two things—prejudice and perjury. I've never seen such malice, such personal hatred in all my life, and I don't think anyone ever has. The crime itself is dreadful, too horrible to talk about, and God grant that the murderer may be found out, and I think he has. I think we can point to Jim Conley and say there is the man.

But, above all, gentlemen, let's follow the law in this matter. In circumstantial cases you can't convict a man as long as there's any other possible theory for the crime of which he is accused, and you can't find Frank guilty if there's a chance that Conley is the murderer. The state has nothing on which to base their case but Conley, and we've shown Conley a liar. Write your verdict of not guilty and your consciences will give your approval.

MR. ROSSER, FOR THE PRISONER. *August 22.*

Mr. Rosser: Gentlemen of the jury. All things come to an end. With the end of this case has almost come the end

of the speakers, and but for the masterly effort of my brother, Arnold, I almost wish it had ended with no speaking. My condition is such that I can say but little; my voice is husky and my throat almost gone. But for my interest in this case and my profound conviction of the innocence of this man, I would not undertake to speak at all.

I want to repeat what my friend, Arnold, said so simply. He said this jury is no mob. The attitude of the juror's mind is not that of the mind of the man who carelessly walks the streets. My friend, Hooper, must have brought that doctrine with him when he came to Atlanta. We walk the street carelessly and we meet our friends and do not recognize them; we are too much absorbed in our own interests. Our minds wander in flights of fancy or in fits of reverence; we may mean no harm to ourselves, nor to our friends, but we are careless. No oath binds us when we walk the streets.

Men, you are different; you are set aside; you ceased when you took your juror's oath to be one of the rollicking men of the streets; you were purged by your oath. In old pagan Rome the women laughed and chattered on the streets as they went to and fro, but there were a few—the Vestal Virgins—they cared not for the gladiatorial games, nor the strife of the day. So it is with you men, set apart; you care not for the chatter and laughter of the rabble; you are unprejudiced and it is your duty to pass on a man's life with no passion and no cruelty, but as men purged by an oath from the careless people of the streets. You are to decide from the evidence, with no fear of a hostile mob and no thought of favor to anyone.

What suggestion comes into a man's mind when he thinks of a crime like this? And what crime could be more horrible than this one? What punishment too great for the brute in human form who committed it and who excited this community to a high pitch?

Since 1908 the National Pencil factory has employed hundreds of girls and women, and also of men, and not all of the girls and women, not all of the men have been perfect, but

you can find good men and women in all strata of life, and yet the detectives, working with microscopes and with the aid of my friend, Dorsey, excited almost beyond peradventure, found only two to swear against Frank. They found Dalton and they found Conley. Well, I'll take up Conley at a more fitting time, but Dalton, who is Dalton? God Almighty writes on a man's face and he don't always write a pretty hand, but he writes a legible one. When you see Dalton you put your hand on your pocketbook.

When Dalton took the stand Mr. Arnold and I had never had the pleasure of seeing his sweet countenance before, but Mr. Arnold leaned over and whispered in my ear, "There's a thief if there ever was one." I smelt about him the odor of the chaingang, and I began to feel him out. I asked him if he had ever been away from home for any length of time, and he knew at once what I meant and he began to dodge and to wriggle, and before he left the stand I was sure he was a thief.

Dalton was on, three times in Walton county and then in another county where he probably went to escape further trouble in Walton, he got into trouble again. It wasn't just the going wrong of a young man who falls once and tries to get over it, but it was the steady thievery of a man at heart a thief. Of course, Dalton comes here to Atlanta and reforms. Yes, he joined a Godly congregation and persuaded them that he had quit his evil ways. That's an old trick of thieves and they use it to help their trade along.

I believe in the divine power of regeneration; I believe that you can reform, that there's always time to turn back and do right, but there's one kind of man whom I don't believe can ever reform. Once a thief, always a thief.

Our Master knew it. He recognized the qualities of a thief. You remember when they crucified Him and He hung on the cross there on the hill. Well, He had a thief hanging beside Him, and He said to that thief, "This day thou shalt be with Me in Paradise." He didn't dare say tomorrow. He knew He'd better say today, because by tomorrow that thief would be stealing again in Jerusalem. Dalton disgraced the name

of his race, and he was a thief and worse, if there can be, and yet he joined the church. He joined the church and he's now a decent, believable man. Well, you remember how brazenly he sat here on the stand and bragged of his "peach," how indecently he bragged of his fall; how he gloated over his vice. He was asked if he ever went to that miserable, dirty factory basement with a woman for immoral purposes, and he was proud to say that he had.

Gentlemen, it was the first time Dalton had ever been in the limelight; it was the first time decent, respectable white men and women had ever listened to him with respect, let alone attention.

When he was asked about that, if he was guilty, if he had fallen, he might have declined to answer, he might have hung his head in shame, as any decent, respectable man would have done, but instead, he bragged and boasted of it.

When Conley was asked what sort of a woman Frank had, he brazenly and braggingly said he did not know, that he himself had such a peach there that he could not take his eyes off her to look at Frank's woman. Well, you have seen Dalton's peach; you all have seen Daisy.

Conley tells a different story. He says Frank took the peach (that lemon) for himself and that Dalton had to get him another woman.

I'm not saying that we are all free of passion, that we are all moral and perfect, but at least the decent man don't brag of having a peach. Well, if you believe Dalton's story, and let's presume it true now. If you believe it he went into that scuttle hole there at the factory with Daisy. Dalton took that woman into the factory, into a dirty, nasty, fetid hole where the slime oozed and where no decent dog or cat would go, and there he satisfied his passion. That's what he told us. Well, Dalton told us he went there about 2 o'clock one Saturday afternoon last year, and of course, at that time the Clarke Wooden Ware company occupied the lower floor and used the same entrance that the National Pencil Company did, and Frank was at lunch and knew nothing of Dalton's visit. Of

course, Dalton left an oozy trail behind him; wherever he went he did that. You can still feel it in this court room. Of course, too, Dalton may have gone into the pencil factory that day and left his oozy, slimy trail there, but otherwise there's nothing against the factory, and you know there's not, for our great quartet—Starnes and Campbell and Black (oh, how I love Black; I always want to put my arms around him whenever I think of him), and Scott, for he was with that crowd; they tried their very best to find something that would show that factory up as a vile hole.

Well, there's another reason that proves conclusively that it was not the assignation place Dalton and Conley name it. It has always been wrong for men and women to commit fornication and adultery, but it's always been done and the world, as long as it was done decently and quietly and not bragged about and blazoned forth in public places, has rather allowed it to go unchecked, but it's not so now.

You know, I know the working people of this state and this city. I've always worked with my head and it's never been my good fortune to be one of the working people, but there are no silken ladies in my ancestry, nor are there any dudish men. I know the working men and the working women, because that blood runs in my veins, and if any man in Atlanta knows them I do, and I tell you that there are no 100 working girls and women in Atlanta who could be got together by raking with a fine-tooth comb who'd stay there at that factory with conditions as bad as they have been painted, and there are no 100 working men here so thin blooded as to allow such conditions there.

Frank's statement to the jury, it was Frank's handiwork only, and neither he nor Mr. Arnold knew what Frank was going to say when he got on the stand. Look at the statement this man made to you, and it was his statement, not mine. I can prove that by the simple reason that I haven't got brains enough to have made it up, and Mr. Arnold (though he's got far more brains than I), he could not have made it. Mr. Arnold might have given it the same weight and thickness, but not the living ring of truth.

Now, another thing. We didn't have to put Frank's character up. If we hadn't the judge would have told you Frank must be presumed to have a good character, and that you did not have the right to ask that question about him, but we thought you were, and we put it up and see what a character the man has. There's not a man in the sound of my voice who could prove a better character. Of course, I mean from the credible evidence, not that stuff of Conley's and Dalton's. But you say, some people, some former employes swore he had a bad character. You know that when you want to, you can always get someone to swear against anybody's character. Put me in his place and let my friend, Arnold, be foolish enough to put my character up and there'd be plenty of those I have maybe hurt or offended as I have gone through life, would swear it was wrong, and I believe I've got an ordinarily good character. Why, you could bring twenty men here in Fulton county to swear that Judge Roan, there on the bench, has a bad character. You know that he's had to judge men and sometimes to be what they thought was severe on them, and he's naturally made men hate him and they'd gladly come and swear his character away. But if the men and women who live near him, the good and decent men and women, who lived near him and knew, came up and said his character was good, you'd believe them, wouldn't you?

Well, gentlemen, the older I get the gentler I get and I wouldn't think or say anything wrong about those misleading little girls who swore Frank was a bad man. I guess they thought they were telling the truth. Well, did Miss Maggie Griffin really think Frank was a vicious man and yet work there three years with him? Don't you think she heard things against him after the crime was committed and that when she got up here and looked through the heated atmosphere of this trial, she did not see the real truth? And Miss Maggie Griffin, she was there two months. I wonder what she could know about Frank in that time. There was Mrs. Donegan and Miss Johnson and another girl there about two months, and Nellie Potts, who never worked there at all, and

Mary Wallace, there three days, and Estelle Wallace, there a week and Carrie Smith, who like Miss Cato, worked there three years. These are the only ones in the hundreds who have worked there since 1908 who will say that Frank has a bad character. Why, you could find more people to say that the Bishop of Atlanta, I believe, had a bad character, than have been brought against Frank.

You noticed they were not able to get any men to come from the factory and swear against Frank. Men are harder to wheedle than are little girls. Does anybody doubt that if that factory had been the bed of vice that they call it, that the long-legged Gantt would have know of it? They had Gantt on the stand twice, and, well, you know Gantt was discharged from the factory, of course you weren't told why in plain words, but you all know why. Well, Frank is not liked by Gantt and Gantt would have loved to tell something against his former employer, but he couldn't.

If they have any further suspicions against this man, they haven't given them, either because they are afraid or are unable to prove their suspicions, if they have such suspicions, though, and are doing you a worse injustice.

What are these suspicions that they have advanced thus far? First, Miss Robinson is said to have said that she saw Frank teaching Mary Phagan how to work. Dorsey reached for it on the instant, scenting something improper as is quite characteristic of him. But Miss Robinson denies it. There's nothing in it, absolutely nothing. Then they say he called her Mary. Well, what about it? What if he did? We all have bad memories. If you met me on the street six months ago, can you recall right now whether you called me Luther or Rosser? The next is Willie Turner—poor little Willie! I have nohing against Willie. He seems to be a right clever sort of a boy. But just think of the methods the detectives used against him—think of the way they handled him, and think of the way Dorsey treated him on the witness stand. He says—Willie does—that he saw Frank talking to Mary Phagan in the metal room. What does it show if he did see

such a scene? I can't see for the life of me where it indicates any sign of lascivious lust. Does what Willie Turner saw, taking for granted he saw it, show that Frank was planning to ruin little Mary Phagan? Does it uphold this plot my friend Hooper had so much to say about? Even with that—considering Willie Turner did see such a thing, there's one fact that takes the sting out of it. He saw it in broad daylight. Frank was with the little girl right in front of Lemmie Quinn's office in an open factory where there were a lot of people and where the girls were quitting their work and getting ready to go home to dinner. It wasn't so, though, and Frank never made any improper advances to this little girl. Let me tell you why. Mary Phagan was a good girl, as pure as God makes them and as innocent. She was all that, and more. But, she would have known a lascivious advance or an ogling eye the minute she saw it, and the minute this man made any sort of a move to her, she would have fled instantly to home to tell this good father and mother of hers.

Then next, they bring Dewey Hewell, who says she saw Frank with his hand on Mary's shoulder. That's all right, but there is Grace Hix and Helen Ferguson and Magnolia Kennedy who contradict her and say Frank never knew Mary Phagan. You can say all you please about such as that, but there is one fact that stands out indisputable. If that little girl had ever received mistreatment at the pencil factory, no deer would have bounded more quickly from the brush at the bay of dogs than she would have fled home to tell her father and mother.

Now, my friend from the Wiregrass says Gantt was a victim of his "plot" by Frank against Mary Phagan. I don't doubt that this "plot" has been framed in the hearing of every detective in the sound of my voice. Hooper says Frank plotted to get the girl there on the Saturday she was killed—says he plotted with Jim Conley. Jim says Frank told him at four o'clock Friday afternoon to return on the next morning. How could Frank have known she was coming back Saturday. He couldn't have known. He's no seer, no mind-reader, al-

though he's a mighty bright man. It is true that some of the pay envelopes were left over on Friday, but he didn't know whose they were. Helen Ferguson says that on Friday she asked for Mary Phagan's pay and that Frank refused to give it to her, saying Mary would come next day and get it herself. Magnolia Kennedy swears to the contrary. You have one or the other to believe. Consider, though, that this be true! How would Frank know who would be in the factory when Mary Phagan came? How did he know she was coming Saturday? Some envelopes went over to Monday and Tuesday. How would he know whether she would come on Saturday or either of these latter days?

Now, what else have they put up against this man? They say he was nervous. We admit he was. Black says it, Darley says it, Sig. Montag says it—others say it! The handome Mr. Darley was nervous and our friend Schiff was nervous. Why not hang them if you're hanging men for nervousness! Isaac Haas—old man Isaac—openly admits he was nervous. The girls—why don't you hang them, these sweet little girls in the factory—all of whom were so nervous they couldn't work on the following day?

If you had seen this little child, crushed, mangled, mutilated, with the sawdust crumbled in her eyes and her tongue protruding; staring up from that stinking, smelling basement, you'd have been nervous, too, every mother's son of you. Gentlemen, I don't profess to be chicken-hearted. I can see grown men hurt and suffering and I can stand a lot of things without growing hysterical, but I never walked along the street and heard the pitiful cry of a girl or woman without becoming nervous. God grant I will always be so. Frank looked at the mangled form and crushed virginity of Mary Phagan and his nerves fluttered. Hang him! Hang him!

Another suspicious circumstance. He didn't wake up when they telephoned him that morning the body was found. That might depend on what he ate that night; it might depend on a lot of other things. Some of us wake with the

birds, while others slumber even through the tempting call of the breakfast bell. Would you hang us for that?

Then, they say he hired a lawyer, and they call it suspicious—mighty suspicious. They wouldn't have kicked if he had hired Rube Arnold, because Rube has a good character. But they hired me and they kicked and yelled "suspicious" so loudly you could hear it all the way from here to Jesup's cut. I don't know that I had ever met Frank before that morning, but I had represented the pencil factory previously. And as to their employing me, it's this way:

There's no telling what was floating around in John Black's head that morning. They sent men after Frank and there was no telling what was likely to happen to him. They were forced to do something in his own defense. And, as a result, the state's worst suspicion is the fact that they employed me and Herbert Haas. Now, gentlemen, let's see what there is in it; I have told you that twice on that Sunday he had been to police headquarters without counsel, without friends. The next day they adopted new methods of getting him there and sent two detectives for him. Black had said he had been watching Frank, and woe to him who is haunted by the eagle eye of dear old John. They took him to police station Monday—took him I say. The police idea was to show their fangs. He was under arrest, that's an undisputed fact. They had him at police station, Lanford, in his wonted dignity, sitting around doing nothing, letting Frank soak. Beavers, the handsome one, was doing the same. Frank didn't call for friends or lawyer. He didn't call for anything. If he had known what he was up against, though, in this police department of ours, he'd probably have called for two lawyers—or even more. But old man Sig Montag, who has been here a long time, knew this old police crowd and he knew their tactics. He was well on to their curves. He knew what danger there was to Frank. He called up Haas. Haas didn't want to come to police station—he had a good reason. Sig went to police station and was refused permission to see Frank. Now, I want you to get that in your mind. A citizen—not under

arrest, as they say—held without the privilege of seeing friends, relatives or counsel. It was a deplorable state of affairs. What happened?

Haas went to the phone and called an older and more experienced head to battle with this police iniquity; Why shouldn't he? Dorsey sees in this harmless message a chance. He snaps at it like a snake. Dorsey is a good man—in his way. He'll be a better man, though, when he gets older and loses some of his present spirit and venom. There are things he has done in this trial that will never be done again. Gentlemen, I assure you of that.

Did Frank do anything else suspicious? Yes! Two others, according to Hooper from the Wiregrass. One of which was the employment of a detective agency to ferret out this horrible murder that had been committed in his factory building. Why? Under what circumstances? I'll tell you. Frank had been to the police station and had given his statement. Haas was the man who telephoned me and who employed me—not Frank. I went to police headquarters and was very much unwelcomed. There was a frigid atmosphere as I walked in. I saw Frank for the first time in my life. I said: "What's the matter, boys?" Somebody answered that Mr. Frank was under arrest. Black was there, Lanford was there. Neither took the pains to deny that he was under arrest. Somebody said they wanted Mr. Frank to make a statement, and I advised him to go ahead and make it. When he went into the office, I followed. They said: "We don't want you." I replied that whether they wanted me or not, I was coming, anyhow. I had a good reason, too, for coming. I wanted to hear what he said so they couldn't distort his words. While we were in the room a peculiar thing happened. Frank exposed his person. There were no marks. I said that it was preposterous to thing that a man could commit such a crime and not bear some marks. Lanford's face fell. Why didn't Lanford get on the stand and deny it? Was it because he didn't want to get into a loving conflict with me? Or did he want to keep from reopening the dark and nasty history of

the Conley story and the Minola McKnight story that are hidden in the still darker recesses of police headquarters?

Frank makes his statement and is released. He goes back to the pencil factory, assuming that suspicion has been diverted from him. He thinks of the horrible murder that has been committed in his plant. He telephones Sig Montag about hiring a detective agency to solve the crime. Sig advises him to do it. I don't believe there is any detective living who can consort with crooks and criminals and felons, scheme with them, mingle with them and spy on the homes of good people and bad who can then exalt his character as a result. He absorbs some of the atmosphere and the traits. It is logical that he should. But, even at that they've got some good men in the detective and police department. Old man Sig Montag said hire a detective and Frank hired the Pinkertons. Scott came and took Frank's statement and said: "We work in co-operation with the city police department." Now, isn't that a horrible situation—going hand in glove with the police department? But, it's a fact. Just as soon as Scott left Frank, he walked down, arm in arm with John Black, to the nasty, smelly basement of the pencil factory. What did that mean? It meant a complete line-up with the police. It meant if the police turn you loose, I turn you loose. If the police hang you, I hang you!

Gentlemen, take a look at this spectacle, if you can. Here is a Jewish boy from the north. He is unacquainted with the south. He came here alone and without friends and he stood alone. This murder happened in his place of business. He told the Pinkertons to find the man, trusting to them entirely, no matter where or what they found might strike. He is defenseless and helpless. He knows his innocence and is willing to find the murderer. They try to place the murder on him. God, all merciful and all powerful, look upon a scene like this!

Anything else? Yes. Look at this. I do not believe my friend who preceded me intended to do this. I refer to the incident about the time slip. I have to use harsh words here,

but I don't want to. This seems to me the most unkindest cut of all. They say that that time slip was planted. They say the shirt was planted. Gentlemen, is there any evidence of this? Let's see about this statement. Black and somebody else, I believe, went out to Newt's house on Tuesday morning and found the shirt in the bottom of a barrel. They brought the shirt back to the police station and Newt said the shirt was his—or it looked like his shirt. Newt Lee had been hired at the factory but three weeks, yet they want you to believe that they found a shirt like the old man had and went out to his house and put it in a barrel.

One thing is wrong. The newspapers and others, I am afraid, think this is a contest between lawyers. It is not. God forbid that I should let any such thing enter into this case when this boy's life is at stake.

There are several things I don't understand about this case, and never will. Why old man Lee didn't find the body sooner; why he found it lying on its face; how he saw it from a place he could not have seen it from. I was raised with niggers and know something about them. I do not know them as well as the police, perhaps, for they know them like no one else. But I know something about them.

There must have been a nigger in the crime who knew about it before Newt or anyone else. I am afraid Newt knew. Yet, if he did, he is one of the most remarkable niggers I ever saw and I wish I had his nerve. There were things you detectives did to him for which you will never be forgiven. You persecuted the old nigger, and all you got was "Fo' God I don't know." I don't believe he killed her, but I believe he knows more than he told.

But they say now that he jumped back. Suppose he did jump back. Look at the boy (Frank). If you put a girl the size of Mary Phagan in a room with him she could make him jump out of the window. Suddenly this boy stepped out in front of this giant of a Gantt, and he jumped back. Dorsey would have done the same thing; Newt Lee would; Jim Conley would, and I would, as big as I am.

Here is another suspicious thing. Newt Lee came to the factory at four o'clock and Frank sent the old man away. It was suggested that he was afraid the nigger would find the body, yet when he came back at 6, Frank let him stay at the factory when he knew that in 30 minutes Newt was on the job he must go into the basement where they say Frank knew the body was.

They say he was laughing at his home. If he had known of the crime of which he would be accused, that laugh would have been the laugh of a maniac to be ended by the discovery of the body.

Another suspicious thing. You know that he was in the factory, but it turns out that he was not the only one. If the corpse was found in the basement and he was the only one in the building, then there might be some basis. But he was in an open room and there were workmen upstairs. My friend tried to dispute that. That wasn't all. Conley was also there, and it came out yesterday that there was also another nigger—a lighter nigger than Conley—there. What scoundrels in white skin were in the building and had opportunity to commit the crime, God only knows.

The thing that arises in this case to fatigue my indignation is that men born of such parents should believe the statement of Conley against the statement of Frank. Who is Conley? Who was Conley as he used to be and as you have seen him? He was a dirty, filthy, black, drunken, lying nigger. Black knows that. Starnes knows that. Chief Beavers knows it. Who was it that made this dirty nigger come up here looking so slick? Why didn't they let you see him as he was? They shaved him, washed him and dressed him up. Gentlemen of the jury, the charge of moral perversion against a man is a terrible thing for him, but it is even more so when that man has a wife and mother to be affected by it. Dalton, even Dalton did not say this against Frank. It was just Conley. Dalton, you remember, did not even say that Frank was guilty of wrong-doing as far as he knew. There never was any proof of Frank's alleged moral perversion, unless you call Jim

Conley proof. None of these niggers ever came up and said Conley was there and that they were with him. Starnes—and Starnes could find a needle in a haystack, but the Lord only knows what he'd do in an acre—he could not find any of these niggers.

Then there was that old negro drayman, old McCrary, the old peg-leg negro drayman, and thank God he was an old-timer, "fo" de war nigger. You know Conley, wishing to add a few finishing trimmings to his lines, said that old McCrary sent him down in the basement that Saturday morning and when the old darkey was put on the stand he said simply, "No, boss, I never sont him down thar." Everywhere you go you find that Conley lied. He says he watched there one Saturday last year between 2 and 3 o'clock. Well, Schiff says he didn't and so does Darley and Holloway, the latter guaranteed by the state, and the little office boys, nice looking little chaps from nice families, they all say he didn't. Cut out Conley and you strip the case to nothing.

Did you hear the way Conley told his story? Have you ever heard an actor, who knew his Shakespearean plays, his "Merchant of Venice" or his "Hamlet"? He can wake up at any time of the night and say those lines, but he can't say any lines of a play he has never learned. So it was with Conley. He could tell the story of the disposition of the girl's body, and he knew it so well he could reel it off backward or forward, any old way, but when you got to asking him about other things, he always had one phrase, "Boss, ah can't 'member dat."

They say Conley could not have made up that story. Well, I don't know about that. There is something queer in the whole thing, you know. I conldn't climb that post over there, gentlemen. I mean I couldn't go very far up it, but if I had Professor Starnes, and Professor Black, and Professor Campbell, and Professor Rosser, and then Dean Lanford to help me, I'd go quite a way up. Well, they took a notion Mrs. White had seen the negro, and they carried Mrs. White there

to see him, and he twisted up his features so that she couldn't recognize him.

Next, they learned Conley could write. Frank told them that, you know. Well, I don't mean to be severe, but they took that negro and they gave him the third degree. Black and Scott cursed him. "You black scoundrel," they yelled at him. "You know that man never had you come there and write those notes on Friday!" And the poor negro, understanding and trying to please, said, "Yes, boss, zat's right, ah was dere on Saturday." And so they went on and got first one affidavit and then another out of him. Well, Scott and Black had him there, and Conley was only in high school. I don't know whether to call Scott and Black "professors" or not. Scott says, "We told him what would fit and what would not." And it was "stand up, James Conley and recite, when did you fix those notes, James?" and James would answer that he fixed them on Friday, and then the teachers would tell James it was surely wrong, that he must have fixed them on Saturday, and James would know what was wanted and would acknowledge his error. Then it would be, "That's a good lesson, James, you are excused, James." I'm not guessing in this thing. Scott told it on the stand, only in not so plain words. So it was that when this negro had told the whole truth they had another recitation.

Was it fair for two skilled white men to train that negro by the hour and by the day and to teach him and then get a statement from him and call it the truth? Well, Professors Black and Scott finished with him, and they thought Conley's education was through, but that nigger had to have a university course!

Scott, you and Black milked him dry; you thought you did, anyhow, but you got no moral perversion and no watching. In the university they gave a slightly different course. It was given by Professors Starnes and Campbell. Oh, I wish I could look as pious as Starnes does. And Professor Dorsey helped out, I suppose. I don't know what Professor

Dorsey did, only he gave him several lessons, and they must have been just sort of finishing touches before he got his degree. Well, in the university course they didn't dare put the steps in writing, as they had done in the high school; it would have been too easy to trace from step to step, the suggestions made, the additions and subtractions here and there.

Professor Dorsey had him seven times, I know that, but God alone knows how many times the detectives had him. Was it fair to take this weak, pliable negro and have these white men teach him, one after another? Who knows what is the final story that Conley will tell? He added the mesh-bag when he was on the stand.

Mary Phagan had reached the factory at approximately twelve minutes after 12, and it must have been after Monteen Stover had gone. See the statements of W. M. Mathews and W. T. Hollis, street car men called by the defense, and George Epps, the little newsie, called by the state, and also the street car schedule.

But, supposing that she was there at 12:05, as I believe the state claims, then Monteen Stover must have seen her. I don't see how they could have helped meeting. But suppose she got there a moment after Monteen Stover left, then Lemmie Quinn was there at 12:20, and he found Frank at work. Could Frank have murdered a girl and hid her body and then got back to work with no blood stains on him in less than fifteen minutes? If Frank is guilty, he must have, according to Conley, disposed of the body in the time between four minutes to 1 and 1:30. There can be no dispute about this; it's Conley's last revelation. If Frank is guilty, he was at his office between four minutes to 1 and 1:30, but who believes that story?

Little Miss Kerns saw him at Alabama and Whitehall at 1:10, and at 1:20 Mrs. Levy, honest woman that she is, saw him get off the car at his home corner, and his wife's parents saw, and they all swear he was there at 1:20, and then, if you are going to call them all perjurers and believe Jim Conley, think what you must do; think what a horrible thing you

must do—you must make Minola's husband a perjurer, and that would be terrible.

You know about that Minola McKnight affair. It is the blackest of all. A negro woman locked up from the solicitor's office, not because she would talk—she's given a statement—but because she would not talk to suit Starnes and Campbell, and two white men, and shame to them, got her into it. Where was Chief Beavers? What was he doing that he became a party to this crime? Beavers, who would enforce the law; Beavers, the immaculate!

Believe Frank was in the factory if you can at 1:30; throw aside all the respectable people and swear by Conley. Well, I know the American jury is supreme, that it is the sovereign over lives; that sometimes you can sway it by passion and prejudice, but you can't make it believe anything like this.

Neither prejudice, nor passion, wrought by monsters so vile they ought not to be in the court room, could make them believe it. They said that there was a certain man, named Mincey, whom we called as a witness but did not use. Well, the only use we would have had for Mincey was to contradict Conley, and as soon as Conley got on the stand he contradicted himself enough without our having to go to the trouble of calling on witnesses to do it. If we had put Mincey up there would have been a day's row about his probity, and what would have been the use—Conley said time and again that he had lied time and again.

Gentlemen, I want only the straight truth here, and I have yet to believe that the truth has to be watched and cultivated by these detectives and by seven visits of the solicitor general. I don't believe any man, no matter what his rate, ought to be tried under such testimony. If I was raising sheep and feared for my lambs, I might hang a yellow dog on it. I might do it in the daytime, but when things got quiet at night and I got to thinking, I'd be ashamed of myself. You have been overly kind to me, gentlemen. True, you have been up against a situation like that old Sol Russell used to describe when he would say, "Well, I've lectured off and on for forty years, and

the benches always stuck it out, but they was screwed to the floor." You gentlemen have been practically in that fix, but I feel, nevertheless, that you have been peculiarly kind, and I thank you.

THE SOLICITOR GENERAL FOR THE STATE.

Mr. Dorsey. Gentlemen of the Jury: This case is not only, as His Honor has told you, important, but it is extraordinary. It is extraordinary as a crime—a most heinous crime, a crime of a demoniac, a crime that has demanded vigorous, earnest and conscientious effort on the part of your detectives, and which demands honest, earnest, conscientious consideration on your part. It is extraordinary because of the prominence, learning, ability, standing of counsel pitted against me. It is extraordinary because of the defendant—it is extraordinary in the manner in which the gentlemen argue it, in the methods they have pursued in its management. They have had two of the ablest lawyers in the country. They have had Rosser, the rider of the winds and the stirrer of the storm, and Arnold (and I can say it because I love him), as mild a man as ever cut a throat or scuttled a ship. They have abused me; they have abused the detective department; they have heaped so much calumny on me that the mother of the defendant was constrained to arise in their presence and denounce me as a dog. Well, there's an old adage, and it's true, that says, "When did any thief ever feel the halter draw with any good opinion of the law?"

Oh, prejudice and perjury! They say that is what this case is built on, and they use that stereotyped phrase until it fatigues the mind to think about it. Don't let this purchased indignation disturb you. Oh, they ought to have been indignant; they were paid to play the part. Gentlemen, do you think that these detectives and I were controlled by prejudice in this case? Would we, the sworn officers of the law, have sought to hang this man on account of his race and pass over the negro, Jim Conley? Was it prejudice when

we arrested Gantt, when we arrested Lee, when we arrested others? No, the prejudice came when we arrested this man, and never until he was arrested was there a cry of prejudice.

Those gentlemen over there were disappointed when we did not pitch our case along that line, but not a word emanated from this side, showing any prejudice on our part, showing any feeling against Jew or Gentile.

We would not have dared to come into this presence and ask the conviction of a man because he was a Gentile, a Jew or a negro. Oh, no two men ever had any greater pleasure shown on their faces than did Mr. Arnold and Mr. Rosser when they started to question Kendley and began to get before the court something about prejudice against the Jews. They seized with avidity the suggestion that Frank was a Jew.

Remember, they put it before this court, and we did not; the word Jew never escaped our lips. I say that the race this man comes from is as good as ours; his forefathers were civilized and living in cities and following laws when ours were roaming at large in the forest and eating human flesh. I say his race is just as good as ours, but no better. I honor the race that produced Disraeli, the greatest of British statesmen; that produced Judah P. Benjamin, as great a lawyer as England or America ever saw; I honor the Strauss brothers; I roomed with one of his race at college; one of my partners is is of his race. I served on the board of trustees of Grady hospital with Mr. Hirsch, and I know others, too many to count, but when Lieutenant Becker wished to make away with his enemies, he sought men of this man's race.

Then, you will recall Abe Hummell, the rascally lawyer, and Reuff, another scoundrel, and Schwartz, who killed a little girl in New York, and scores of others, and you will find that this great race is as amenable to the same laws as any others of the white race or as the black race is.

They rise to heights sublime, but they also sink to the lowest depths of degradation!

We don't ask a conviction of this man except in conformity with the law which His Honor will give you in charge. His

Honor will charge you that you should not convict this man unless you think he is guilty beyond a reasonable doubt.

A great many jurors, gentlemen, and the people generally get an idea that there is something mysterious and unfathomable about this reasonable doubt proposition. It's as plain as the nose on your face. The text writers and lawyers and judges go around in a circle when they undertake to define it; it's a thing that speaks for itself, and every man of common sense knows what it is, and it isn't susceptible of any definition. One text writer says a man who undertakes to define it uses tautology—the same words over again. Just remember, gentlemen of the jury, that it is no abstruse proposition, it is not a proposition way over and above your head—it's just a common sense, ordinary, everyday practical question. In the 83rd Georgia, one of our judges defines it thus:

"A reasonable doubt is one that is opposed to an unreasonable doubt; it is one for which a reason can be given, and it is one that is based on reason, and it is such a doubt that leaves the mind in an uncertain and wavering condition, where it is impossible to say with reason nor certainty that the accused is guilty."

If you have a doubt, it must be such a doubt as to control and decide your conduct in the highest and most important affairs of life. It isn't, gentlemen, as is said in the case of John vs. State, in 33d Georgia, "a vague, conjectural doubt or a mere guess that possibly the accused may not be guilty"; it isn't that; "it must be such a doubt as a sensible, honest-minded man would reasonably entertain in an honest investigation after truth." It must not be, as they say, in the case of Butler vs. State, 92 Georgia, "A doubt conjured up"; or as they say in the 83 Georgia, "A doubt which might be conjured up to acquit a friend." "It must not be," as they say in the 63 Georgia, "a fanciful doubt, a trivial supposition, a bare possibility of innocence,"—that won't do, that won't do; "it doesn't mean the doubt," they say in 90 Georgia, "of a crank or a man with an over-sensitive nature, but practical, common sense is the standard."

Conviction can be established as well upon circumstantial

good character. It is presumed—had he not put his character in issue, it would have been presumed—and the State would have been absolutely helpless—that this man was as good a man as lived in the City of Atlanta. It's a mighty easy thing, if a man is worth anything, if a man attains to any degree of respectability, it's a mighty easy thing to get some one to sustain his character but it's the hardest thing known to a lawyer to get people to impeach the character of another. In the Durant case, his character was unimpeached. The defendant here put his character in issue and we accepted the challenge, and we met it, I submit to you. Now, if we concede that this defendant in this case was a man of good character—a thing we don't concede—still, under your oath and under the law that His Honor will give you in charge, as is laid down in the 88 Georgia, page 92, "Proof of good character will not hinder conviction, if the guilt of the defendant is plainly proved to the satisfaction of the jury."

First, you have got to have the good character, before it weighs a feather in the balance, and remember, that the hardest burden, so far as proof is concerned, that ever rests on anybody, is to break down the character of a man who really has character and I ask you if this defendant stands before you a man of good character?

Mr. Arnold, as though he had not realized the force of the evidence here against the man who, on April 26th, snuffed out the life of little Mary Phagan, in his desperation stood up in this presence and called nineteen or twenty of these reputable, high-toned girls, though they be working girls, "crack-brain fanatics and liars," and they have hurled that word around here a good deal, too, they have hurled that word around here a good deal. If that's an attribute of great men and great lawyers, I here and now proclaim to you I have no aspirations to attain them. Not once will I say that anybody has lied, but I'll put it up to you as twelve honest, conscientious men by your verdict to say where the truth lies and who has lied. I'm going to be satisfied with your verdict, too—I know this

case and I know the conscience that abides in the breast of honest, courageous men.

Now, the book says that if a man has good character, nevertheless it will not hinder conviction, if the guilt of the defendant is plainly proved to the satisfaction of the jury—as it was in the Durant case, and I submit that, character or no character, this evidence demands a conviction. And I'm not asking you for it either because of prejudice—I'm coming to the perjury after a bit. Have I so forgotten myself that I would ask you to convict that man if the evidence demanded that Jim Conley's neck be broken?

Now, Mr. Arnold said yesterday, and I noticed it, though it wasn't in evidence, that Jim Conley wasn't indicted. No, he will never be, for this crime, because there is no evidence—he's an accessory after the fact, according to his own admission, and he's guilty of that and nothing more. And I'm here to tell you that, unless there's some other evidence besides that which has been shown here or heretofore, you've got to get you another Solicitor General before I'll ask any jury to hang him, lousy negro though he may be; and if that be treason, make the most of it. I have got my own conscience to keep, and I wouldn't rest quite so well to feel that I had been instrumental in putting a rope around the neck of Jim Conley for a crime that Leo M. Frank committed. You'll do it, too.

I want you to bear in mind, now, we haven't touched the body of this case, we have been just clearing up the underbrush—we'll get to the big timber after awhile. "Where character is put in issue"—and the State can't do it, it rests with him—"Where character is put in issue, the direct examination must relate to the general reputation, good or bad;" that is, whoever puts character in issue, can ask the question with reference to the general reputation, good or bad, as the case may be, "but on cross-examination particular transactions or statements of single individuals may be brought into the inquiry in testing the extent and foundation of the witnesses' knowledge, and the correctness of his testimony on direct examination."

We did exercise that right in the examination of one witness, but knowing that we couldn't put specific instances in unless they drew it out, I didn't want even to do this man the injustice, so we suspended, and we put it before this jury in this kind of position—you put his character in, we put up witnesses to disprove it, you could cross examine every one of them and ask them what they knew and what they had heard and what they had seen; we had already given them enough instances, but they didn't dare, they didn't dare to do it. Mark you, now, here's the law:

"Where character is put in issue, the direct examination must relate to the general reputation;" we couldn't go further, but on cross examination, when we put up these little girls, sweet and tender, ah, but "particular instances or statements of single individuals, you could have brought into the inquiry," but you dared not do it. You tell me that the testimony of these good people living out on Washington Street, the good people connected with the Hebrew Orphans' Home, Doctor Marx, Doctor Sonn, you tell me that they know the character of Leo M. Frank as these girls do, who have worked there but are not now under the influence of the National Pencil Company and its employees? Do you tell me that if you are accused of a crime, or I am accused of a crime, and your character or my character is put in issue, that if I were mean enough to do it, or if Messrs. Starnes and Campbell were corrupt enough to do it, that you could get others who would do your bidding? I tell you, in principle and common sense, it is a dastardly suggestion. You know it, and I know you know it, and you listen to your conscience and it will tell you you know it, and you have got no doubt about it. The trouble about this business is, throughout the length and breadth of our land, there's too much shenanigane and too little honest, plain dealings; let's be fair, let's be honest, let's be courageous! Tell me that old Pat Campbell or John Starnes or Mr. Rosser—in whose veins, he says, there flows the same blood as flows in the attorney's veins—that they could go and get nineteen or twenty of them, through preju-

dice and passion to come up here and swear that that man's character is bad and it not be true? I tell you it can't be done, and you know it.

Ah, but, on the other hand, Doctor Marx, Doctor Sonn, all these other people, as Mr. Hooper said, who run with Doctor Jekyll, don't know the character of Mr. Hyde. And he didn't call Doctor Marx down to the factory on Saturday evenings to show what he was going to do with those girls, but the girls know.

Now, gentlemen, put yourself in this man's place. If you are a man of good character, and twenty people come in here and state that you are of bad character, your counsel have got the right to ask them who they ever heard talking about you and what they ever heard said and what they ever saw. Is it possible, I'll ask you in the name of common sense, that you would permit your counsel to sit mute? You wouldn't do it, would you? If a man says that I am a person of bad character, I want to know, curiosity makes me want to know, and if it's proclaimed, published to the world and it's a lie, I want to nail the lie—to show that he never saw it, and never heard it and knows nothing about it. And yet, three able counsel and an innocent man, and twenty or more girls all of whom had worked in the factory but none of whom work there at this time, except one on the fourth floor, tell you that that man had a bad character, and had a bad character for lasciviousness—the uncontrolled and uncontrollable passion that led him on to kill poor Mary Phagan. This book says it is allowable to cross-examine a witness, to see and find out what he knows, who told him those things—and I'm here to tell you that this thing of itself is pregnant, pregnant, pregnant with significance, and does not comport with innocence on the part of any man. We furnished him the names of some. Well, even by their own witnesses, it looks to me there was a leak, and little Miss Jackson dropped it out just as easy. Now, what business did this man have going in up there, peering in on those little girls—the head of the factory, the man that wanted flirting forbidden? What business did

he have going up into those dressing rooms? You tell me to go up there to the girls' dressing room, shove open the door and walk in is a part of his duty, when he has foreladies to stop it? No, indeed. And old Jim Conley may not have been so far wrong as you may think. He says that somebody went up there that worked on the fourth floor, he didn't know who. This man, according to the evidence of people that I submit you will believe, notwithstanding the fact that Mr. Reuben R. Arnold said it was a lie and called them hair-brained fanatics—according to the testimony even of a lady who works there now and yet is brave enough and courageous enough to come down here and tell you that that man had been in a room with a lady that works on the fourth floor; and it may have been that he was then, when he went in there on this little Jackson girl and the Mayfield girl and Miss Kitchens, looking out to see if the way was clear to take her in again—and Miss Jackson, their witness, says she heard about his going in there three or four times more than she ever saw it, and they complained to the foreladies—it may have been right then and there he went to see some woman on the fourth floor that old Jim Conley says he saw go up there to meet him Saturday evening, when all these good people were out on Washington Street and Montags, and the pencil factory employees, even, didn't know of the occurrence of these things.

August 23.

Mr. Dorsey. I was just about concluding, yesterday, what I had to say in reference to the matter of character, and I think that I demonstrated by the law, to any fair-minded man, that this defendant has not a good character. The conduct of counsel in this case, as I stated, in failing to cross-examine, in refusing to cross-examine these twenty young ladies, refutes effectively and absolutely the claims of this defendant that he has good character. As I said, if this man had had a good character, no power on earth could have kept him and his counsel from asking those girls where they got their information, and why it was they said that this defendant was a man of bad character. I have already shown you that under the

law, they had the right to go into that character, and you saw that on cross-examination they dared not do it. I have here an authority that puts it right squarely, that "whenever any one has evidence (83 Ga., 581) in their possession, and they fail to produce it, the strongest presumption arises that it would be hurtful if they had, and their failure to produce evidence is a circumstance against them."

You don't need any law book to make you know that that's true, because your common sense tells you that whenever a man can bring evidence, and you know that he has got it and don't do it, the strongest presumption arises against him. And you know, as twelve honest men seeking to get at the truth, that the reason these able counsel didn't ask those "hair-brained fanatics," as Mr. Arnold called them, before they had ever gone on the stand—girls whose appearance is as good as any they brought, girls that you know by their manner on the stand spoke the truth, girls who are unimpeached and unimpeachable, was because they dared not do it. You know it; if it had never been put in a law book you'd know it. And then you tell me that because these good people from Washington Street come down here and say that they never heard anything, that he is a man of good character.

Many a man has gone through life and even his wife and his best friends never knew his character; and some one has said that it takes the valet to really know the character of a man. And I had rather believe that these poor, unprotected working girls, who have no interest in this case and are not under the influence of the pencil company or Montag or anybody else, know that man, as many a man has been heretofore, is of bad character, than to believe the Rabbi of his church and the members of the Hebrew Orphans' Home.

Sometimes, you know, a man of bad character uses charitable and religious organizations to cover up the defects, and sometimes a consciousness in the heart of a man will make him over-active in some other line, in order to cover up and mislead the public generally. Many a man has been a wolf in sheep's clothing; many a man has walked in high society and

appeared on the outside as a whited sepulcher, who was as rotten on the inside as it was possible to be.

So he has got no good character, I submit, never had it; he has got a reputation—that's what people say and think about you—and he has got a reputation for good conduct only among those people that don't know his character. But suppose that he had a good character; that would amount to nothing. David of old was a great character until he put old Uriah in the fore-front of battle in order that he might be killed—that Uriah might be killed, and David take his wife. Judas Iscariot was a good character, and one of the Twelve, until he took the thirty pieces of silver and betrayed our Lord Jesus Christ. Benedict Arnold was brave, enjoyed the confidence of all the people and those in charge of the management of the Revolutionary War until he betrayed his country. Since that day his name has been a synonym for infamy. Oscar Wilde, an Irish Knight, a literary man, brilliant, the author of works that will go down the ages—Lady Windemere's Fan, De Profundis—which he wrote while confined in jail; a man who had the effrontery and the boldness, when the Marquis of Queensbury saw that there was something wrong between this intellectual giant and his son, sought to break up their companionship, he sued the Marquis for damages, which brought retaliation on the part of the Marquis for criminal practices on the part of Wilde, this intellectual giant; and wherever the English language is read, the effrontery, the boldness, the coolness of this man, Oscar Wilde, as he stood the cross-examination of the ablest lawyers of England—an effrontery that is characteristic of the man of his type—that examination will remain the subject matter of study for lawyers and for people who are interested in the type of pervert like this man. Not even Oscar Wilde's wife—for he was married and had two children—suspected that he was guilty of such immoral practices, and, as I say, it never would have been brought to light probably, because committed in secret, had not this man had the effrontery and the boldness and the impudence himself to start the proceeding which

culminated in sending him to prison for three long years. He's the man who led the aesthetic movement; he was a scholar, a literary man, cool, calm and cultured, and as I say, his cross examination is a thing to be read with admiration by all lawyers, but he was convicted, and in his old age, went tottering to the grave, a confessed pervert. Good character? Why, he came to America, after having launched what is known as the "Aesthetic movement," in England, and throughout this country lectured to large audiences, and it is he who raised the sunflower from a weed to the dignity of a flower. Handsome, not lacking in physical or moral courage, and yet a pervert, but a man of previous good character. Abe Reuf, of San Francisco, a man of his race and religion, was the boss of the town, respected and honored, but he corrupted Schmitt, and he corrupted everything that he put his hands on, and just as a life of immorality, a life of sin, a life in which he fooled the good people when debauching the poor girls with whom he came in contact has brought this man before this jury, so did eventually Reuf's career terminate in the penitentiary. I have already referred to Durant. Look at McCue, the mayor of Charlottesville; a man of such reputation that the people elevated him to the head of that municipality, but notwithstanding that good reputation, he didn't have rock bed character, and, becoming tired of his wife, he shot her in the bath tub, and the jury of gallant and noble and courageous Virginia gentlemen, notwithstanding his good character, sent him to a felon's grave. Richardson, of Boston, was a preacher, who enjoyed the confidence of his flock. He was engaged to one of the wealthiest and most fascinating women in Boston, but an entanglement with a poor little girl, of whom he wished to rid himself, caused this man Richardson to so far forget his character and reputation and his career as to put her to death. And all these are cases of circumstantial evidence. And after conviction, after he had fought, he at last admitted it, in the hope that the Governor would at least save his life, but he didn't do it; and the Massachusetts jury and the Massachusetts Governor were cour-

ageous enough to let that man who had taken that poor girl's life to save his reputation as the pastor of his flock, go, and it is an illustration that will encourage and stimulate every right-thinking man to do his duty. Then, there's Beattie. Henry Clay Beattie, of Richmond, of splendid family, a wealthy family, proved good character, though he didn't possess it, took his wife, the mother of a twelve-months-old baby, out automobiling, and shot her; yet that man, looking at the blood in the automobile, joked! joked! joked! He was cool and calm, but he joked too much; and although the detectives were abused and maligned, and slush funds to save him from the gallows were used, in his defense, a courageous jury, an honest jury, a Virginia jury measured up to the requirements of the hour and sent him to his death; thus putting old Virginia and her citizenship on a high plane. And he never did confess, but left a note to be read after he was dead, saying that he was guilty. Crippen, of England, a doctor, a man of high standing, recognized ability and good reputation, killed his wife because of infatuation for another woman, and put her remains away where he thought, as this man thought, that it would never be discovered; but murder will out, and he was discovered, and he was tried, and be it said to the glory of old England, he was executed.

But you say, you've got an alibi. Now, let's examine that proposition a little bit. An alibi—Section 1018 defines what an alibi is. "An alibi, as a defense, involves the impossibility"—mark that—"of the prisoner's presence at the scene of the offense at the time of its commission." "An alibi involves the impossibility, and the range of evidence must be such as reasonably to exclude the possibility of guilt"—and the burden of carrying that alibi is on this defendant. "It involves the impossibility"—they must show to you that it was impossible for this man to have been at the scene of that crime. The burden is on them; an alibi, gentlemen of the jury, while the very best kind of defense if properly sustained, is absolutely worthless—I'm going to show you in a minute that this alibi is worse than no defense at all. I want

to read you a definition that an old darkey gave of an alibi, which I think illustrates the idea. Rastus asked his companion, "What's this here alibi you hear so much talk about?" And old Sam says, "An alibi is proving that you was at the prayer meeting, where you wasn't, to show that you wasn't at the crap game, where you was."

Now, right here, let me interpolate, this man never made an admission, from the beginning until the end of this case, except he knew that some one could fasten it on him—wherever he knew that people knew he was in the factory, he admitted it. All right; but you prove an alibi by that little Kerens girl, do you? She swore that she saw you at Alabama and Broad at 1:10, and yet here is the paper containing your admission made in the presence of your attorney, Monday morning, April 28, that you didn't leave the factory until 1:10.

Gentlemen, talk to me about sad spectacles, but of all the sad spectacles that I have witnessed throughout this case—I don't know who did it, I don't know who's responsible, and I hope that I'll go to my grave in ignorance of who it was that brought this little Kerens girl, the daughter of a man that works for Montag, into this case, to prove this alibi for this red-handed murderer, who killed that little girl to protect his reputation among the people of his own race and religion. Jurors are sworn, and His Honor will charge you, you have got the right to take into consideration the deportment, the manner, the bearing, the reasonableness of what any witness swears to, and if any man in this court house, any honest man, seeking to get at the truth, looked at that little girl, her manner, her bearing, her attitude, her actions, her connections with Montag, and don't know that she, like that little Bauer boy, had been riding in Montag's automobile, I am at a loss to understand your mental operations.

But if Frank locked the factory door at ten minutes past one, if that be true, how in the name of goodness did she ever see him at Alabama and Broad at 1:10? Mark you, she had never seen him but one time; had never seen him but one time, and with the people up there on the street, to see the parade,

waiting for her companions, this daughter of an employee of Montag comes into this presence and tells you the unreasonable, absurd story, the story that's in contradiction to the story made by Frank, which has been introduced in evidence and will be out with you, that she saw that fellow up there at Jacobs'.

On this time proposition, I want to read you this—it made a wonderful impression on me when I read it—it's the wonderful speech of a wonderful man, a lawyer to whom even such men as Messrs. Arnold and Rosser, as good as the country affords, as good men and as good lawyers as they are, had they stood in his presence, would have pulled off their hats in admiration for his intellect and his character—I refer to Daniel Webster, and I quote from Webster's great speech in the Knapp case:

"Time is identical, its subdivisions are all alike, no man knows one day from another, or one hour from another, but by some fact, connected with it. Days and hours are not visible to the senses, nor to be apprehended and distinguished by understanding. He who speaks of the date, the minute and the hour of occurrences with nothing to guide his recollection, speaks at random."

That's put better than I could have put it. That's put tersely, concisely, logically, and it's the truth. Now, what else about this alibi, this chronological table here, moved up and down to save a few minutes? The evidence, as old Sig Montag warned me not to do, twisted, yea, I'll say contorted, warped, in order to sustain this man in his claim of an alibi. For instance, they got it down here "Frank arrived at the factory, according to Holloway, Alonzo Mann, Roy Irby, at 8:25." That's getting it down some, ain't it? Frank says he arrived at 8:30. Old Jim Conley, perjured, lousy and dirty, says that he arrived there at 8:30, and he arrived, carrying a rain coat. And they tried mightily to make it appear that Frank didn't have a rain coat, that he borrowed one from his brother-in-law, but Mrs. Ursenback says that Frank had one; and if the truth were known, I venture the assertion that the reason Frank borrowed Ursenback's rain coat on Sunday was because, after

the murder of this girl on Saturday, he forgot to get the rain coat that old Jim saw him have. Miss Mattie Smith leaves building, you say, at 9:20 A. M. She said—or Frank says—at 9:15. You have it on this chart here that's turned to the wall that Frank telephoned Schiff to come to his office at 10 o'clock, and yet this man Frank, coolly, composedly, with his great capacity for figures and data, in his own statement says that he gets to Montag's at that hour. And you've got the records, trot them out, if I'm wrong. At 11 A. M. Frank returns to the pencil factory; Holloway and Mann come to the office; Frank dictates mail and acknowledges letters. Frank, in his statement, says 11:05. Any way, oh Lord, any hour, any minute, move them up and move them down, we've got to have the alibi—like old Uncle Remus' rabbit, we're just 'bleeged to climb. "12:12, approximate time Mary Phagan arrives." Frank says that Mary Phagan arrived ten or fifteen minutes after Miss Hall left; and with mathematical accuracy, you've got Miss Hall leaving the factory at 12:03. Why, I never saw so many watches, so many clocks or so many people who seem to have had their minds centered on time as in this case. Why, if people in real life were really as accurate as you gentlemen seek to have us believe, I tell you this would be a glorious old world, and no person and no train would ever be behind time. It doesn't happen that way, though. But to crown it all, in this table which is now turned to the wall, you have Lemmie Quinn arriving, not on the minute, but, to serve your purposes, from 12:20 to 12:22; but that, gentlemen, conflicts with the evidence of Freeman and the other young lady, who placed Quinn by their evidence, in the factory before that time.

Mr. Arnold. There isn't a word of evidence to that effect; those ladies were there at 11:35 and left at 11:45, Corinthia Hall and Miss Freeman, they left there at 11:45, and it was after they had eaten lunch and about to pay their fare before they ever saw Quinn, at the little cafe, the Busy Bee. He says that they saw Quinn over at the factory before 12, as I understood it.

Mr. Dorsey. Yes, sir, by his evidence.

Mr. Arnold. That's absolutely incorrect, they never saw Quinn there then and never swore they did.

Mr. Dorsey. No, they didn't see him there, I doubt if anybody else saw him there either.

Mr. Arnold. If a crowd of people here laugh every time we say anything, how are we to hear the Court? He has made a whole lot of little mis-statements, but I let those pass, but I'm going to interrupt him on every substantial one he makes.

Mr. Dorsey. He says those ladies saw Quinn—says they "saw Quinn was there before 12, and before I left there at 1 o'clock." "You saw him at that, did you?" "Yes, sir." "Now, you are sure he did that?" "Yes, sir." "You are positive he did that?" "Yes, sir"; and then Mr. Arnold comes in with his suggestion, and she takes the bait and runs under the bank—he saw how it cut. Then I came back at her again—now, just to show how she turned turtle, "You did see Frank working Saturday morning on the financial sheet?" "No, he didn't work on the financial sheet." "Why did you state a moment ago you saw him working on it?" "No, sir, I didn't."

My Lord! Gentlemen, are you going to take that kind of stuff? I know she is a woman, and I'd hesitate except I had the paper here in my hand, to make this charge, but if you, as honest men, are going to let the people of Georgia and Fulton County and of Atlanta suffer one of its innocent girls to go to her death at the hands of a man like this and then turn him loose on such evidence as this, then I say, it's time to quit going through the farce of summoning a jury to try him. If I had the standing, the ability and the power of either Messrs. Arnold or Rosser, to ring that into your ears and drive it home, you would almost write a verdict of guilty before you left your box.

Perjury! Perjury! When did old John Starnes and Pat Campbell, from the Emerald Isle, or Rosser ever fall so low that, when they could convict a negro—easy, because he wouldn't have Arnold and Rosser, but just my friend Bill Smith. And for what reason do they want to let Jim go and go after this man Frank? Why didn't they take Newt Lee? Why didn't they take Gantt? The best reason in the world

til that time—"I didn't stay there very often on Saturday afternoon;" Miss Fleming didn't stay there all afternoon. Now, gentlemen, I submit this man made that financial sheet Saturday morning. He could have fixed up that financial sheet Saturday afternoon, but he wouldn't have done it without Schiff having furnished the data if he hadn't been suspecting an accusation of murdering that little girl. A man of Frank's type could easily have fixed that financial sheet—a thing he did fifty-two times a year for five or six years—and could have betrayed no nervousness, he might easily—as he did when he wrote for the police—in the handwriting, a thing that he was accustomed to do—even in the presence of the police—you'll have it out with you—he may have written so as not to betray his nervousness.

And speaking about perjury: There's a writing that his mother said anybody who knew his writing ought to be able to identify and yet, that man you put up there to prove Frank's writing, was so afraid that he would do this man some injury, that he wouldn't identify the writing that his mother says that anybody that knows it at all, could recognize. I grant you that he didn't betray nervousness, probably, in the bosom of his family; I grant you that he could fix up a financial sheet that he had been fixing up fifty-two times a year for five or six years and not betray nervousness; I grant you that he could unlock the safe, a thing that he did every day for three hundred and sixty-five days in the year, without betraying nervousness; but when he went to run the elevator, when he went to nail up the door, when he talked to the police, when he rode to the station, then he showed nervousness.

And he could sit in a hall and read and joke about the baseball umpire, but his frivolty, that annoyed the people Saturday night that they had the card game, was the same kind of frivolity that Beattie betrayed when he stood at the automobile that contained the blood of his wife that he had shot. And certainly it is before this jury that he went in laughing and joking and trying to read a story that resulted only in annoyance to the people that were in that card game.

But whether or not he made out that financial sheet, I'll tell you something that he did do Saturday afternoon, when he was waiting up there for old Jim to come back to burn that body, I'll tell you something that he did do—and don't forget the envelope and don't forget the way that that paper was folded, either, don't forget it. Listen to this: "I trust this finds you and dear tont (that's the German for aunt) well after arriving safe in New York. I hope you found all the dear ones well, in Brooklyn."

Didn't have any wealthy people in Brooklyn, eh? This uncle of his was mighty near Brooklyn, the very time old Jim says he looked up and said, "I have wealthy people in Brooklyn." And I would really like to know, I would like to see how much that brother-in-law that runs that cigar business has invested in that store, and how much he has got. The very letter that you wrote on Saturday, the 26th, shows that you anticipated that this old gentleman, whom everybody says has got money, was then, you supposed, in Brooklyn, because here you say that "I hope you have found all the dear ones well"—but I'm coming back to what Frank said to old Jim—"and I await a letter from you telling me how you found things there in Brooklyn. Lucile and I are well.

Now, here is a sentence that is pregnant with significance, which bears the ear-marks of the guilty conscience; tremulous as he wrote it? No, he could shut his eyes and write and make up a financial sheet—he's capable and smart, wonderfully endowed intellectually, but here's a sentence that, if I know human nature and know the conduct of the guilty conscience, and whatever you may say about whether or not he prepared the financial sheet on Saturday morning, here's a document I'll concede was written when he knew that the body of little Mary Phagan, who died for virtue's sake, lay in the dark recesses of that basement. "It is too short a time," he says, "since you left for anything startling to have developed down here." Too short! Too short! Startling! But "Too short a time," and that itself shows that the dastardly deed was done in an incredibily short time. And do you tell me, honest men,

fair men, courageous men, true Georgians, seeking to do your duty, that that phrase, penned by that man to his uncle on Saturday afternoon, didn't come from a conscience that was its own accuser? "It is too short a time since you left for anything startling to have developed down here." What do you think of that? And then listen at this—as if that old gentleman, his uncle, cared anything for this proposition, this old millionaire traveling abroad to Germany for his health, this man from Brooklyn—an eminent authority says that unusual, unnecessary, unexpected and extravagant expressions are always earmarks of fraud; and do you tell me that this old gentleman, expecting to sail for Europe, the man who wanted the price list and financial sheet, cared anything for those old heroes in gray? And isn't this sentence itself significant: "Today was yontiff (holiday) here, and the thin gray lines of veterans here braved the rather chilly weather to do honor to their fallen comrades"; and this from Leo M. Frank, the statistician, to the old man, the millionaire, or nearly so, who cared so little about the thin gray line of veterans, but who cared all for how much money had been gotten in by the pencil factory.

"Too short a time for anything startling to have happened down here since you left"; but there was something startling, and it happened within the space of thirty minutes. "There is nothing new in the factory to report." Ah! there was something new, and there was something startling, and the time was not too short. You can take that letter and read it for yourself. You tell me that letter was written in the morning, do you believe it? I tell you that that letter shows on its face that something startling had happened, and that there was something new in the factory, and I tell you that that rich uncle, then supposed to be with his kindred in Brooklyn, didn't care a flip of his finger about the thin gray line of veterans. His people lived in Brooklyn, that's one thing dead sure and certain, and old Jim never would have known it except Leo M. Frank had told him, and they had at least $20,000 in cold cash out on interest, and the brother-in-law the owner

of a store employing two or three people, and we don't know how many more; and if the uncle wasn't in Brooklyn, he was so near thereto that even Frank himself thought he was at the very moment he claimed he was there, because he says, "you have seen or are with the people in Brooklyn."

All right; let's go a step further. On April 28th, he wired Adolph Montag in care of the Imperial Hotel—listen, now, to what he says—"You may have read in Atlanta papers of factory girl found dead Sunday morning." In factory? In factory? No, "in cellar." Cellar where? "Cellar of pencil factory." There's where he placed her, there's where he expected her to be found; and the thing welled up in his mind to such an extent that, Monday morning, April 28th, before he had ever been arrested, he wires Montag forestalling what he knew would surely and certainly come unless the Atlanta detectives were corrupted and should suppress it.

"You have read in Atlanta papers of factory girl found dead Sunday morning in cellar of pencil factory. Police will eventually solve it,"—he didn't have any doubt about it—"Police will eventually solve it"—and be it said to their credit, they did,—"Assure my uncle"—he says, Monday morning—"I am all right in case he asks. Our company has case well in hand." "Girl found dead in pencil factory cellar," he says in the telegram, "the police will eventually solve it," he says, before he was arrested, "I am all right, in case my uncle asks," and "our company has the case well in hand."

Well, maybe he did think that when he got that fellow Scott, that he had it well in hand. I'll tell you, there's an honest man. If there was a slush fund in this case,—these witnesses here say they don't know anything about it, but if there was a slush fund in this case, Scott could have got it, because, at first, he never heard any words that sounded better to him than when Scott said "we travel arm in arm with the police," that's exactly what Frank wanted them to do at that time, he wanted somebody that would run with Black and Starnes and Rosser, and it sounded good to him, and

he said all right. He didn't want him to run anywhere else, because he wanted him to work hand in glove with these men, and he wanted to know what they did and what they said and what they thought. But Haas—and he's nobody's fool—when he saw that they were getting hot on the trail, opened up the conversation with the suggestion that "now you let us have what you get, first," and if Scott had fallen for that suggestion, then there would have been something else. You know it. You tell me that letter and that telegram are not significant? I tell you that this evidence shows, notwithstanding what "Joe Darter" Schiff swore, when he saw the necessity to meet this evidence of Miss Fleming, which Mr. Arnold tried so hard, because he saw the force of it, to turn into another channel, that Frank didn't fix that financial sheet Saturday morning. I say that, with the stenographer gone and Frank behind (and Schiff had never done such a thing before, he had always stuck to him in getting it up before), that what Gantt told you is the truth.

This man, expert, brilliant—talk about this expert accountant, Joel Hunter! Why, he isn't near as smart as this man Frank, to begin on, and besides, the idea of his going up there and taking up those things and trying to institute a comparison as to how long it would take him, even if he had the capacity of Frank—he hasn't got it—to go up there and do those things—why, it's worse than ridiculous.

And Frank himself wasn't satisfied with all this showing about what he had done, he got up on the stand,—he saw the weakness of his case, and he's as smart as either one of his lawyers, too, let me tell you, and I'll bet you he wrote that statement, too, they may have read it, but he wrote it—Frank realized that he must go over and beyond what the evidence was, and through his statement he sought to lug into this case something that they didn't have any evidence for. Why? Because he knew in his heart that all this talk about the length of time it took to fix that financial sheet was mere buncombe. Then he seeks to put in here through that statement—and if we hadn't stopped him he would have done it—

a whole raft of other stuff that Schiff, as willing as he was, as anxious as he was, couldn't stultify himself to such an extent as to tell you that Frank did that work Saturday morning. But if he did write that financial sheet Saturday afternoon, a thing I submit he didn't do,—I'm willing to admit he wrote that letter,—I ask you, as fair men and honest men and disinterested jurors representing the people of this community in seeing that justice is done and that the man who committed that dastardly deed has meted out to him that which he meted out to this poor little girl, if this documentary evidence, these papers, don't have the impress of a guilty man? You know it.

All right; but you say there's perjury. Where is it? I'll tell you another case—I have already referred to it—it's when that man, put up there to identify Frank's writing, failed to identify a writing that Frank's own mother swore that anybody that knew anything about his writing could have identified. There's perjury there when Roy Bauer swore with such minute particularity as to his visits to that factory. There's perjury when this man Lee says that Duffy held his finger out and just let that blood spurt. But that ain't all. Here's the evidence of Mrs. Carson. Mrs. Carson says she has worked in that factory three years; and Mr. Arnold, in that suave manner of his, without any evidence to support it, not under oath, says "Mrs. Carson, I'll ask you a question I wouldn't ask a younger woman, have you ever at any time around the ladies' dressing room seen any blood spots?" and she said "I certainly have." That's a ridiculous proposition on its face. "Have you seen that on several occasions or not?" "I seen it three or four times"—not in three years; but now, "Did you ever have any conversation with Jim Conley?" and she says, "Yes, on Tuesday he came around to sweep around my table"—that's exactly where Jim says he was Tuesday morning before this man was arrested; "What floor do you work on?" "Fourth." "What floor do your daughters work on?" "On the fourth." "Did you see him up there Monday morning?" "No sir"—that's

Frank. "Tuesday morning?" "I saw him Tuesday morning"—he was up there on the fourth floor after the murder, on Tuesday, "sometime between nine and eleven o'clock." I said, "between nine and eleven, somewhere along there?" "Sometime between nine and eleven thirty." "Now, Jim Conley and Leo M. Frank were both on your floor between the same hours?" "I saw Mr. Frank and I saw Jim Conley."

"You know it because you had a conversation with Mr. Frank, and you had a conversation with Jim Conley?" "Yes, I saw them both." And Conley says—and surely Conley couldn't have been put up to it by these men, even if they had wanted to suborn perjury—that when Frank came up there Tuesday morning before he was arrested, it was then that he came to him and leaned over and said "Jim, be a good boy," and then Jim, remembering the money and remembering the wealthy people in Brooklyn and the promises that Frank made, says, "Yes, I is."

Tuesday morning, says Mrs. Carson, your witness, Jim Conley and Frank both were on that floor, and Jim was doing exactly what he said he was doing, sweeping. Now, let's see. This old lady was very much interested. "Now, did you go on the office floor to see that blood"—listen at this "What blood?" "The blood right there by the dressing room?" "What dressing room, what blood are you talking about?" "She had seen it three or four times all over the factory. "On the second floor?" "No sir," she says, "I never did see that spot." "Never saw it at all?" "No, I didn't care to look at nothing like that." "You don't care to look at nothing like that?" "No sir, I don't."

Now, that's Mrs. Carson, the mother of Miss Rebecca, that's what she told you under oath when she was on the stand.

Now, let's see about perjury. Now, mark you, I'm not getting up here and saying this generally, without putting my finger on the specific instances, and I'm not nearly exhausting the record,—you can follow it up,—but I am just picking out a few instances. Here's what Mrs. Small says

about Jim Conley reading the newspapers. Well, if Jim had committed that crime and he hadn't felt that he had the power and influence of Leo Frank back of him to protect him, he never would have gone back there to that factory or sat around and read newspapers, and you know it, if you know anything about the character of the negro. Why was he so anxious to get the newspapers? It was because Jim knew some of the facts that he wanted to see, negro-like,—that's what made him so anxious about it. Here Mr. Arnold comes,—"You are a lady that works on the fourth floor, and I'm going to ask you a question that we are going to ask every lady that works on that fourth floor;" and we caught them out on that proposition, too, didn't we? And you don't know right now how many women that worked on that floor were put up and how many weren't. You've got the books and the records and you could have called the names, and you didn't dare do it, and after you had gone ahead and four-flushed before this jury as to what you were going to do, we picked out Miss Kitchens and brought her here and she corroborated your own witness, Miss Jackson, as to the misconduct of this superintendent, Frank.

Now, let's see what Mrs. Small says—Mrs. Small is the lady that got the raise, you remember, and couldn't tell what date it was, thought it had been about four months ago, she got a five cent raise; about four months ago would make it since this murder, and when I got to quizzing her about it she didn't know when she got the raise, and she's not the only one that got the raise, and it wasn't only in the factory that they raised them, either. Even Minola McKnight got some raise, and after she saw the import of it, "You don't remember the exact date." "No sir, I don't," when she had already placed the date subsequent to this murder; and this woman, Mrs. Small, also corroborates Jim Conley about being up there Tuesday.

"Did you see Mr. Frank up there any of those days?" "I saw Mr. Frank up there Tuesday after that time." "What

time Tuesday?" "I couldn't tell you, I guess it was between eight and nine o'clock." The other one saw him somewhere between nine and eleven or eleven thirty. This lady, their witness, says that he was up there between eight and nine.

Why was Frank so anxious to go up there on that floor? Why? It was because he wanted to see this man Jim Conley that he thought was going to protect him. Mr. Rosser characterized my suggestion that this man Frank called upon and expected Jim Conley to conceal the crime as a dirty suggestion, and I accept it as absolutely true, and I go a step further, and say it was not only dirty, it was infamous. And he would today sit here in this court house and see a jury of honest men put a rope around Jim Conley's neck, the man that was brought into it by him; and he didn't mean to bring Jim Conley in unless he had to—and he had to. Jim says the first question he asked him when he saw him down there after this dastardly crime had been committed was, "Have you seen anybody go up?" "Yes," says Jim, "I have seen two girls go up but I haven't seen but one come down." And then it was that this man saw the absolute necessity of taking Jim into his confidence, because he knew that Jim was on the lookout for him, and Starnes and Campbell and Black, combined, together, and even if you make a composite intellect and add the brilliance of Messrs. Rosser and Arnold to that of these detectives, could never have fitted that piece of mosiac into the situation; it isn't to be done.

"Jim, have you seen anybody go up?" "Yes," said Jim, "I see two girls go up but only one came down." And you told Jim to protect you, and Jim tried to do it, and the suggestion was dirty, and worse than that, it is infamous, to be willing to see Jim Conley hung for a crime that Leo Frank committed.

But I'm coming to that after a while, I haven't got to the State's case yet, I'm just cutting away some of the underbrush that you have tried to plant in this forest of gigantic oaks to smother up their growth, but you can't do it, the

facts are too firmly and too deeply rooted. Oh, yes, says Mrs. Small, I saw Frank up there on that fourth floor between eight and nine o'clock Tuesday morning, and the other lady saw him up there between nine and eleven, she wouldn't be sure the day he was arrested—I say arrested, according to Frank's own statement himself, they got him and just detained him, and even then, red-handed murderer as he was, his standing and influence, and the standing and influence of his attorney, somehow or other—and that's the only thing to the discredit of the police department throughout the whole thing, say what you may—they were intimidated and afraid because of the influence that was back of him, to consign him to a cell like they did Lee and Conley, and it took them a little time to arrive at the point where they had the nerve and courage to face the situation and put him where he ought to be.

Now, I'll tell you another thing, too, if old John Black—and Mr. Rosser didn't get such a great triumph out of him as he would have us believe, either. Black's methods are somewhat like Rosser's methods, and if Black had Rosser where Rosser had Black, or if Black had Rosser down at police station, Black would get Rosser; and if Black had been given an opportunity to go after this man, Leo M. Frank, like he went after that poor defenseless negro, Newt Lee, towards whom you would have directed suspicion, this trial might have been obviated, and a confession might have been obtained. You didn't get your lawyer to sustain you and support you a moment too soon. You called for Darley, and you called for Haas, and you called for Rosser, and you called for Arnold, and it took the combined efforts of all of them to keep up your nerve. And I don't want to misquote and I won't misquote, but I want to drive it home with all the power that I possibly can or that I possess. The only thing in this case that can be said to the discredit of the police department of the City of Atlanta is that you treated this man, who snuffed out that little girl's life on the second floor of that pencil factory, with too much consideration, and you

let able counsel and the glamour that surrounds wealth and influence, deter you. I honor—but I honor the way they went after Minola McKnight. I don't know whether they want me to apologize for them or not, but if you think that finding the red-handed murderer of a little girl like this is a ladies' tea party, and that the detectives should have the manners of a dancing master and apologize and palaver, you don't know anything about the business. You have seen these dogs that hunt the 'possum bark up a tree or in a stump, and when they once get the scent of the 'possum, you can do what you like but they'll bark up that tree and they'll bark in that stump until they run him out, and so with old John Starnes and Campbell. They knew and you know that Albert McKnight would never have told Craven this tale about what he saw and what his wife had told him except for the fact that it be true, and if you had been Starnes, you would have been barking up that tree or barking in that stump until you ran out what you knew was in there. That's all there is to it.

You have got the writ of habeas corpus that's guaranteed to you, go and get it; and if Mr. Haas had come to me Tuesday morning and said "You direct the police"—on Monday morning, when Frank was taken down into custody, and said to me, "You direct the police to turn this man Frank loose, he's innocent," I would have said "It's none of my business, I run my office, they run their office," and the next time the police department, in an effort to serve the people of this community, take a negro that they know and you know and lock her up or what not, I'll not usurp the functions of the judge of these courts, who can turn her loose on a habeas corpus, and direct them to turn her loose or interfere in any way in their business; I don't run the police department of the City of Atlanta, I run the office of Solicitor General for the term that the people have elected me, and I'm taken to task because I went in at the beginning of this thing and didn't stand back.

I honor Mr. Hill. I am as proud of having succeeded him

as I am that I was elected to the position by the people of this community, to the office of Solicitor General, but I have never yet seen the man that I would take as my model or pattern; I follow the dictates of my own conscience. And if there is one act since I have been Solictor General of which I am proud, it is the fact that I joined hand and glove with the detectives in the effort to seek the murderer of Mary Phagan, and when your influence poured letters in to the Grand Jury, in an effort to hang an innocent man, negro though he be, that I stood firmly up against it. If that be treason, make the best of it. And if you don't want me to do it, then get somebody else to fill the job, and the quicker you do it the better it will suit me. I will not pattern myself after anybody or anybody's method, not even Mr. Hill, and, bless his old soul, he was grand and great, and I have wished a hundred times that he was here today to make the speech that I'm now making. There wouldn't be hair or hide left on you,—he was as noble as any Roman that ever lived, as courageous as Julius Caesar, and as eloquent as Demosthenes. Such talk as that don't scare me, don't terrify me, don't disturb the serenity of my conscience, which approves of everything that I have done in the prosecution of this man.

Now, let's come back here and discuss this thing of perjury, let's talk about that a little, let's not get up here and say that everybody is a liar without citing any instances and that they are crack-brain fanatics, let's knuckle down and get specific instances. So this Mrs. Small says she saw Jim Conley,—"Did you see Mr. Frank up there on any of those days?" "I saw Mr. Frank after that crime on Tuesday." "What time Tuesday?" "I couldn't tell you, I guess between eight and nine o'clock, he and Miss Carson were coming up from the back end of the factory (Miss Rebecca, I presume)." "He and Mrs. Carson were coming up from the back end of the factory, and I stepped up in front of him and I said 'Here, Mr. Frank, wait a moment, O. K. this ticket,' he says 'are you going to put me to work as soon as I get here?' and I says 'Yes it's good for your health.' He

O. K.'d the ticket and I went on with my work." So Frank was up there Tuesday morning.

"Now, speaking about Mrs. Carson, how far towards the elevator did Mrs. Carson go with Frank? A.—"Mrs. Carson wasn't up there, it was Miss Carson, Miss Rebecca." The old lady says she was; I said, "Oh, the old lady wasn't up there at all?" No, sir; she wasn't there Tuesday at all." "You saw Miss Rebecca Carson walking up towards the elevator?" "Yes sir." "What was Conley doing?" "Standing there by the elevator." And yet Jim has lied about Frank! Frank was up there twice, Jim was sweeping, Jim was there by the elevator. "At the time you saw Frank, the negro was standing there at the elevator?" "Yes, sir; he wasn't sweeping, he was standing there with his hand on the truck looking around." "Did he see you and Frank?" "I guess he must have seen us." "Where was Conley when he went down the steps?" "Standing in front of the elevator." "How close did Frank pass Conley?" "As close as from here to that table, about four feet." "Conley was still standing there with his hand on that thing, is that true?" "Yes sir."

"That's exactly like Conley says." And here's another thing: This woman, Mrs. Small, testifies about that elevator,—it shakes the whole building, I said, anybody in the world could tell it if the machinery wasn't running? She says, "No, anybody in the world could tell it if the machinery wasn't running, but you can't notice it unless you are close to the elevator." I asked "If there was hammering and knocking, would you still hear the elevator?" She said, "You could if you get close to it." Well, of course, you could, nobody disputes that. "If the elevator was up here, and you were back in the rear and there was hammering and knocking going on, you couldn't?" "No sir." And that disposes of that point, that's the truth on that.

Now, Mrs. Carson had already sworn here positively that she didn't go down to see that blood, hasn't she? There were too many of these people over there at the factory who had

seen that blood,—that blood that at first wasn't blood, it was paint, and then wasn't paint but was cat's blood or blood from somebody that was injured, and then wasn't fresh blood but was stale blood—too many of them had seen it. "On Wednesday I had no business back there, I was there one day but can't remember." "What did you go back there for?" "A crowd of us went at noon to see if we could see any blood spots." "Were you successful?" "No sir." "Who went with you?" And lo and behold, Mrs. Carson, the mother of Rebecca, had already stated that she didn't go about it, the very first person that this Mrs. Small refers to—"Well, Mrs. Carson." "Mrs. Carson went with you," I said. "Yes sir, she saw the places where the blood was said to be." "You know she was there, you are pretty sure she was there?" Mrs. Small said "Yes sir." "It looked like what?" "Looked like powder." "How much of it down there?" "A small amount, just a little, looked like some of the girls had been powdering their face and spilled powder." You know better than that. I came back to the subject, "What makes you say Mrs. Carson went down there with you?" Answer —"Because curiosity sent us down there." "Did curiosity send her down there too?" "We went back afterwards."

Now, gentlemen, somebody swore,—and I put it up to you, too,—somebody committed perjury! "You were going back yourself and went to get her?" "Yes sir." "She didn't make any objection to going down, did she?" "No sir." "Don't you know she didn't go?" "I know," she says, "that she did."

All right; if this case is founded on perjury, it's the kettle calling the pot black, and I haven't dealt in glittering generalities, I have set forth specific cases. But that isn't intended to be exhaustive, that's a mere summary of a few of these instances, they are too numerous to mention. The truth is that there is no phase of this case, where evidence was needed to bolster it up that somebody hasn't come in, you say, willingly and without pay, because, you say there is

no slush fund back of this case. Now, let's pass on here a little bit.

They tried mighty hard to break down this man Albert McKnight with Minola—and I believe I'll leave that for a little later and come now to this statement of Frank's. Gentlemen, I wish I could travel faster over this. I'm doing the very best I can, I have a difficult task and I wish I didn't have it to do at all.

Now, gentlemen, I want to discuss briefly right here these letters, and if these letters weren't "the order of an all-ruling Providence I should agree with my friends that they are the silliest pieces of stuff ever practiced; but these letters have intrinsic marks of a knowledge of this transaction," these pads, that pad,—things usually found in his office,—this man Frank, by the language of these notes, in attempting to fasten the crime upon another, "has indelibly fixed it upon himself." I repeat it, these notes, which were intended to fix the crime upon another, "have indelibly fixed it upon this defendant," Leo M. Frank. The pad, the paper, the fact that he wanted a note,—you tell me that ever a negro lived on the face of the earth who, after having killed and robbed, or ravished and murdered a girl down in that dark basement, or down there in that area, would have taken up the time to have written these notes, and written them on a scratch pad which is a thing that usually stays in the office, or written them on paper like this, found right outside of the office of Frank, as shown on that diagram, which is introduced in evidence and which you will have out with you? You tell me that that man, Jim Conley, sober, as Tillander and Graham tell you, when they went there, would have ravished this girl with a knowledge of the fact that Frank was in that house? I tell you no. Do you tell me that this man, Jim Conley, "drunk as a fiddler's bitch," if you want it that way, would, or could have taken time to have written these notes to put beside the body of that dead girl? I tell you no, and you don't need me to tell you, you know it. The fact, gentlemen of the jury, that these notes were written—ah, but you say

that it's foolish. You say it's foolish. It's ridiculous. It was a silly piece of business, it was a great folly; but murder will out, and Providence directs things in a mysterious way, and not only that, as Judge Bleckley says, "Crime, whenever committed, is a mistake in itself; and what kind of logic is it that will say that a man committed a crime, which is a great big mistake and then in an effort to cover it up, won't make a smaller mistake?" There's no logic in that position. The man who commits a crime makes a mistake, and the man who seeks to cover it up nearly always makes also a little mistake. And this man here, by these notes, purporting to have been written by little Mary Phagan, by the verbiage and the language and the context, in trying to fasten it on another, as sure as you are sitting in this jury box "has indelibly fastened it on himself." These gentlemen saw the significance of the difference between Scott's evidence, when he was before the Coroner,—and he wasn't quizzed there particularly about it,—"I told her no," and "I told her I didn't know;" to tell that little girl "No," would have given her no excuse, according to their way of thinking, to go back to see whether that metal had come or not, but to tell her "I didn't know," would lure her back into the snare where she met her death. And your own detective, Scott, says, after he gave the thing mature deliberation, that this man on the Monday evening,—and he was so anxious about getting a detective that he had that man Schiff telephone three times, three times, three times, three times,—remember that,—so anxious was he. Scott says, after thinking over the matter, that Leo M. Frank told that girl that he didn't know whether the metal had come or not, and she went back there to see about the metal, and he followed her back there.

I'll tell you another thing, that old Starnes and Campbell and Rosser, and even Newport Lanford, if he had been called in, and even if I had been called in, to save my life, could not have known that the very word that Leo M. Frank used, according to Jim Conley when Conley says Frank told him "I'm going to chat with a girl," would have been used ex-

actly four times, as I'll show you when I come to read this statement by Leo M. Frank, for he chatted, and he chatted, and he chatted, and he chatted, according to his own statement. This letter that I hold in my hand says that this negro "did it." Old Jim Conley in his statement here, which I hold in my hand, every time he opened his mouth says "I done it." Old Jim Conley, if he had written these notes, never would have said "this negro did it by his self" but Frank wanted it understood that the man that did do it, "did it by his self." Jim Conley says that Frank says he wanted to chat, and four times in this statement before they suspended to go out and let you refresh yourself, this man Frank had said that somebody came in the office "to chat," and Mr. Arnold, in making his argument to the jury, realized, because he is as keen and as smart as they ever get to be, the force of that word and endeavored to parry the blow which I now seek to give this defendant.

And you tell me that old Jim Conley, after he had robbed and murdered, or after he had ravished and murdered this girl, when he would have had no occasion in the world to have cared whether her dead body was found right there at that chute, was such a fool as to take the time to take her body way back there in the basement and hide it behind the corner of that room? I tell you that it never occurred. That body was taken down there and put in the place where it was. Why? Because she was murdered on the second floor, where the blood spots are found, and because Leo M. Frank, the superintendent of the plant, saw and felt the necessity that that girl's body should not be found on the second floor of the pencil factory, but, to use the language which he put in the letter or telegram which he sent to Adolph Montag in New York, "in the cellar." My! My! "That negro fireman down here did this."

Now, let's see how many times Jim says "done it": "I locked the door like he done told me, I remembers that because the man what was with the baby looked at me like he thought I done it." That's when they ran into the man that

Jim says looked at him like he thought "I done it." It's the difference between ignorance and education, and these notes that you had that man prepare in your office on this paper that stayed on that floor and on that pad that came from your office, bear the marks of your diction, and Starnes and Campbell, with all their ingenuity, couldn't have anticipated that old Jim would get up here and state that "this man looked at me when he ran into that baby, like I done it;" and couldn't have made him say "I locked the door like he done told me;" and couldn't have said "I went on and walked up to Mr. Frank and told him that girl was done dead, he done just like this and said sh-h-h." I could go on with other instances.

And there's your word "chat," "chat," "chat," "chat," four times, I'm going to read it to you, it's here in black and white, and you can't get around it. This girl went down there in that scuttle hole? Listen at this,—you didn't want to say that she went back there to see about the metal, but you knew that the ladies' water closet was back there, and you make this poor girl say "I went to make water," "I went to make water, he pushed me down that hole, a long, tall, black negro"—"long, slim, tall, negro, I write while he play with me." And this note says "that long, tall, black negro did it by his self." Make water? Where did she go to make water? Right back there in the same direction that she would have gone to see about the metal. You tell me, except providentially, that that would have crept in here? You tell me that old Jim Conley, negro, after he had struck that girl with that big stick,—which is a plant as sure as you are living here and as sure as Newt Lee's shirt was a plant,—you tell me that negro felt any inducement or necessity for leaving that girl's form anywhere except where he hit her and knocked her down? You tell me that he had the ingenuity, —and mark you, Starnes and these other men weren't there then to dictate and map out,—you tell me that he would write a note that she went back to make water when there's no place and her usual place was up there on the second floor?

I tell you, gentlemen of the jury, that a smarter man than Starnes, or a smarter man than Campbell, a smarter man than Black, a smarter man than Rosser, in the person of Leo M. Frank, felt impelled to put there these letters, which he thought would exculpate him, but which incriminate and damn him in the minds of every man seeking to get at the truth. Yet you tell me there's nothing in circumstantial evidence, when here's a pad and there's the pad and there's the notes, which you must admit, or which you don't deny, old Jim Conley wrote, because you say in your statement you had got numerous notes from him, and yet, the very day, at the police station, according to your own statement, when you wrote that, you saw the original of these, and you didn't open your mouth, you didn't say a word, you didn't direct the finger of suspecion against this man Jim Conley, who had been infamously directed to keep quiet to protect you. Things don't happen that way, gentlemen, and you know it. There isn't an honest man on that jury, unbiased, unprejudiced, seeking to get at the truth, but what knows that these letters,—silly? Yes, silly, except you see the hand of Providence in it all—that don't know that the language and the context and the material out of which they are written were written for the protection of Leo M. Frank, the superintendent of this factory, who wired Montag to tell his uncle "if my uncle inquires about me state that I am all right, the police have the thing well in hand and will eventually solve the problem," and the girl was found dead, not in the factory, but in the cellar. The man who wrote the note, "nothing startling has happened in so short a time," wrote it with a knowledge and conscious of the fact that this poor girl's life had been snuffed out even at the time he penned the words.

You'll have this out with you, you look at them, if you can get anything else out of them you do it, and as honest men, I don't want you to convict this man unless you are satisfied of his guilt beyond a reasonable doubt, but don't let that doubt be the doubt of a crank, don't let it be the doubt of a

man who has conjured it up simply to acquit a friend, or a man that has been the friend of a friend; let it be the doubt of an honest, conscientious, upright juror, the noblest work of Almighty God.

Now this statement. I tell you, gentlemen of the jury, that when this statement you heard Frank make is scanned, it is susceptible of but one construction, and that is, that it is the statement of a guilty man, made to fit in these general circumstances, as they would have you believe—these gentlemen here harped a great deal, gentlemen of the jury, "are you going to convict him on this, are you going to convict him on that." It isn't the law that circumstantial evidence is inferior to direct and positive evidence, and it is correct to instruct the jury that there is nothing in the nature of circumstantial evidence that renders it less reliable than other classes of evidence. The illustration that they would seek, gentlemen of the jury, not by direct language did they do it in their argument to you, because we had already read them this authority, but they would bring up this isolated fact and that isolated fact and they would say "are you going to convict him on that?" I don't ask your conviction on that. Two illustrations, first, each of the incidental facts surrounding the main fact in issue, is a link in a chain, and that the chain is not stronger than its weakest link, this authority says is generally rejected as an incorrect metaphor and liable to misconstruction. The second illustration and the one that is approved is, each of the incidental facts surrounding the main facts in issue are compared to the strands in a rope, where none of them may be sufficient in itself, but all taken together may be strong enough to establish the guilt of the accused beyond a reasonable doubt.

And so they took isolated instance after isolated instance and then said "are you going to convict him on that?" I say no. But I do say that these instances each constitute a chain, or a cord,—a strand in a cable, and that, when you get them all, all together, you have a cable that ought to hang anybody. That's the proposition. Not on this isolated in-

stance or that one, but upon all, taken together and bound together, which make a cable as strong as it is possible for the ingenuity of man to weave around anybody.

Now, listen at this statement and let's analyze that as we go on a little. I don't know whether this man's statement to the jury will rank along with the cross-examination of that celebrated pervert, Oscard Wilde, or not, but it was a brilliant statement, when unanalyzed, and if you just simply shut your eyes and mind to reason and take this statement, then, of course, you are not going to convict. But listen to what our Courts say about these statements—I have already read it to you, but I want to read it again. "Evidence given by a witness has inherent strength which even a jury cannot under all circumstances disregard; a statement has none." No cross-examination, no oath, merely a statement adroitly prepared to meet the exigencies of the case.

Now, listen at this. This man Frank says "I sat in my office checking over the amount of money which had been left over"—not the cash, not cash, but the amount of money which had been left over—"from the pay-roll"—from the $1,100.00 that they had drawn Friday, and to this day, we don't know how much was left over, and we don't know whether what was left over coupled with the cash left on hand would make this bundle of bills that old Jim says was shown to him and taken back, when Frank wanted to get him to go down into the dark cellar and burn that body by himself, and old Jim says "I'll go if you go, but if I go down there and burn that body, somebody might come along and catch me and then what kind of a fix will I be in?" And I'll tell you right now, if Jim Conley had gone down in that cellar and had undertaken to have burned that body, as sure as the smoke would have curled upward out of that funnel towards Heaven, just so certain would Leo M. Frank have been down there with these same detectives, and Jim Conley would have been without a shadow of a defense. But old Jim, drunk or sober, ignorant or smart, vile or pure, had too much sense, and while he was willing to write the notes to

be put by the dead body, and was willing to help this man take the body from the second floor, where the blood was found, into the basement and keep his mouth shut and to protect him, until the combined efforts of Scott and Black and Starnes and all these detectives beat him down and made him admit a little now and a little then, he wasn't willing, and he had too much sense, to go down into that basement to do that dirty job by himself and cremate the remains of this little girl that that man in his passionate lust had put to death. You don't show that he didn't have the money, and the truth of the business is, I expect, that out of that $1,100.00 for the pay-roll, and $30.00 in cash which you had, if the truth were known, you offered old Jim Conley and bought him with that $200.00 just as surely as Judas Iscariot implanted the kiss for the thirty shekels.

He says that "No one came into my office who asked for a pay envelope or for the pay envelope of another." This running-mate and friend of the dead girl tells you under oath that she went there on Friday evening when they were paid, with the knowledge that little Mary wasn't there, and as she had done on previous occasions, sought to get the money to take to her. And I'll show you when I get to the State's case later on that this diabolical plot, of which you have made so much fun, is founded in reason and really did exist, and that this man really, goaded on by passion, had been expecting some time before to ultimately, not murder this little girl, but cause her to yield to his blandishments and deflower here without her resistance. Let me do it right now.

Way back yonder in March, as far back as March, little Willie Turner, an ignorant country boy, saw Frank trying to force his attentions on this little girl in the metal room; he is unimpeached, he is unimpeachable. She backed off and told him she must go to her work, and Frank said "I am superintendent of this factory,"—a species of coercion—"and I want to talk to you." You tell me that that little girl that worked up there and upon the same floor with you in the metal department, and you had passed right by her machine,

this pretty, attractive little girl, twelve months, and a man of your brilliant parts didn't even know her, and do you tell me that you had made up the pay-roll with Schiff fifty-two times during the year that Mary Phagan was there and still you didn't know her name or number? You tell me that this little country boy who comes from Oak Grove, near Sandy Springs in the northern part of this county, was lying when he got on that stand? I'll tell you no. Do you tell me that little Dewey Hewell, a little girl now from the Home of the Good Shepherd in Cincinnati, who used to work at the National Pencil Company, who probably has lost her virtue though she is of such tender years, was lying when she tells you that she heard him talking to her frequently,—talked to Mary frequently, placed his hands on her shoulder and called her Mary? You tell me that that long-legged man, Gantt, the man you tried to direct suspicion towards, the man Schiff was so anxious to have arrested that he accompanied the police, that you said in your telegram to your uncle, had the case in hand and would eventually solve the mystery,—do you tell me that Gantt has lied when he tells you that this man Frank noticed that he knew little Mary and said to him, "I see that you know Mary pretty well?"

I am prepared to believe, knowing this man's character as shown by this evidence, that way back yonder in March, old passion had seized him. Yesterday Mr. Rosser quoted from Burns, and said it's human to err; and I quote you from the same poem, in which old Burns says that "there's no telling what a man will do when he has the lassie, when convenience snug, and he has a treacherous, passionate inclination." There's no telling what he will do when he's normal, there's no telling what he will do when he's like other men, but oh! gentlemen, there's no telling what a pervert will do when he's goaded on by the unusual, extraordinary passion that goaded on this man, Leo M. Frank, when he saw his opportunity with this little girl in that pencil factory, when she went back to find out if the metal had come.

You tell me that all of these people have lied,—Willie Tur-

ner has lied? Dewey Hewell has lied? That Gantt has lied? That Miss Ruth Robinson has lied? And even Frank, in his statement, admits that he knew Mary well enough to know that Gantt was familiar with her, because Chief Detective Harry Scott was told on Monday, April 28th, that this man Gantt was familiar with little Mary. And yet you expect an honest jury of twelve men—although out of your own mouth you told these detectives, whom you wired your uncle would eventually solve the problem, you told them that this man Gantt was so familiar with her that you directed suspicion towards him. How did you know it if you didn't know little Mary? And in addition, as I have stated, you tell me that this brilliant man had helped to make out the pay-roll for fifty-two times and seen little Mary's name there, and he didn't even know her name and had to go and get his book to tell whether she worked there or not? And I wouldn't be at all surprised, gentlemen of the jury—it's your man Frank's own statement,—that shortages occurred in the cash even after this man Gantt left,—I wouldn't be at all surprised if the truth of the business is that this man coveted that little girl away back yonder in March, I wouldn't be at all surprised, gentlemen, and, indeed, I submit that it's the truth, that every one of these girls has told the truth when they swore to you on the stand that back yonder in March, after this little girl had come down to work on the office floor in the metal department, that they observed this man, Leo M. Frank, making advances towards her and using his position as superintendent to force her to talk with him. I wouldn't be at all surprised if he didn't hang around, I wouldn't be at all sprprised if he didn't try to get little Mary to yield. I wouldn't be surprised if he didn't look upon this man Gantt, who was raised on an adjoining farm in Cobb County, as an obstacle to the accomplishment of the evil purpose which he had in hand, and I wouldn't be at all surprised if, instead of discharging Gantt for a one dollar shortage, which Gantt says "I'll give up my job rather than pay," that you put him out of that factory because you thought he stood

in the way of the consummation of your diabolical and evil plans.

And you say that you and Schiff made up the pay-roll Friday, and I wouldn't be at all surprised that, after little Mary had gone and while you and Schiff were making up the pay-roll Friday afternoon, you saw little Mary's name and you knew that she hadn't been notified to come there and get her money Friday afternoon at six o'clock, and then, as early as three o'clock,—yes, as early as three,—knowing that this little girl would probably come there Saturday at twelve, at the usual hour, to get her pay, you went up and arranged with this man Jim Conley to look out for you,—this man Jim Conley, who had looked out for you on other occasions, who had locked the door and unlocked it while you carried on your immoral practices in that factory,—yes, at three o'clock, when you and Schiff were so busy working on the pay-roll, I dare say you went up there and told Jim that you wanted him to come back Saturday but you didn't want Darley to know that he was there. And I wouldn't be at all surprised if it were not true that this little Helen Ferguson, the friend of Mary Phagan, who had often gotten Mary's pay envelope before, when she went in and asked you to let her have that pay envelope, if you didn't refuse because you had already arranged with Jim to be there, and you expected to make the final onslaught on this girl, in order to deflour and ruin her and make her, this poor little factory girl, subservient to your purposes.

Ah, gentlemen, then Saturday comes, Saturday comes, and it's a reasonable tale that old Jim tells you, and old Jim says "I done it,"—not "I did it," but "I done it" just exactly like this brilliant factory superintendent told him. There's your plot. I'll tell you, you know this thing passion is like fraud,—it's subtle, it moves in mysterious ways; people don't know what lurks in the mind of a libertine, or how anxious they are, or how far ahead they look, and it isn't at all improbable, indeed, I submit to you as honest men seeking to get at the truth, that this man, whose character was put in

issue and torn down, who refused to go into specific instances on cross-examination, if he didn't contemplate this little girl's ruin and damnation it was because he was infatuated with her and didn't have the power to control that ungovernable passion. There's your plot; and it fits right in and jams right up, and you can twist and turn and wabble as much as you want to, but out of your own mouth, when you told your detective, Scott, that this man Gantt was familiar with that little girl, notwithstanding at other places in this statemen you tried to lead this jury of honest men to believe you didn't know her—I tell you that he did know her, and you know that he knew her.

What are you going to believe? Has this little Ferguson girl lied? Is this little factory girl a hair-brained fanatic suborned to come up here and perjure herself, by John Starnes or Black or Campbell or any of the detectives? Do you tell me that such a thing can be done, when the State of Georgia, under the law hasn't a nickel that this girl could get? I tell you, gentlemen, you know that's a charge that can't stand one instant.

Now, he says right here in his statement that he kept the key to his cash box right there in his desk. Well, he makes a very beautiful statement about these slips—but I'll pass that and come to that later. He explains why they were put on there April 28th, and so forth. Now, here's the first reference that he makes to "chatting": "I stopped that work that I was doing that day and went to the outer office and chatted with Mr. Darley and Mr. Campbell." "I should figure about 9:15, or a quarter to nine, Miss Mattie Smith came in and asked for her pay envelope." Jim is corroborated there, he identified Miss Mattie Smith and told with particularity what she did. He says, "I kept my cash box in the lower drawer of the left hand side of my desk." Jim says that's where he got some cash. This man also shows he took a drink at Cruickshank's soda fount and two or three times during this statement he showed that he was doing at the soda fount exactly as Jim says he was doing as they came on

back from the factory. Again he says, "but I know there was several of them and I went on chatting with Mr. Montag." I told you I was going to read you this, and I just wanted you to know we were going to have this out with you. Another thing he says, "I moved the papers I brought back from Montag's in the folder;" old Jim says he had the folder and put the folder away; "I would look and see how far along the reports were which I used in getting my financial statement up every Saturday afternoon, and, to my surprise, I found the sheet which contains the record of pencils packed for the week didn't include the report for Thursday, the day the fiscal week ended, that's the only part of the data that Schiff hadn't got up." "A short time after they left my office, two gentlemen came in, one of them Mr. Graham"—Mr. Graham says that he talked to this negro down stairs; the negro told him the way to the office, and they tried to get around it on the idea there's some difference in color. Well, being in jail, gentlemen, changes the complexion of anybody. That man was there, Graham says, Tillander says, and he was there for what purpose? By whose request? And he wasn't drunk, either. And then he says, "I gave the required pay envelope to the two fathers," this man Frank says, "I gave the pay envelope and chatted with them at some length."

Mr. Arnold says these darkeys pick up the language and manners of the men by whom they are employed. I tell you that, if Frank didn't come in contact with the people that worked in that factory more than he would lead you to believe, old Jim Conley never had the opportunity to pick up words that he uses; and yet here old Jim says, and even in his statement, even in his statement, this man uses the very language that Jim puts in his mouth. I just picked out four of them, in a very few pages, I don't know how many others there are.

"Miss Hall finished her work and started to leave when the twelve o'clock whistle blew." Whistle blowing on a holiday? Well, maybe it did, I'll leave that for you to say.

Another place he says "I chatted with them:" "Entering, I found quite a number of people, among them Darley," etc. "I chatted with them a few minutes,"—using the same words Jim said he used with reference to this girl: "Miss Hall left my office on her way home; there were in the building at the time, Arthur White and Harry Denham and Arthur White's wife, on the top floor; to the best of my knowledge, it must have been ten or fifteen minutes after Miss Hall left my office when this little girl, whom I afterwards found to be Mary Phagan, entered my office and asked for her pay envelope." "This little girl whom I afterwards found"—why didn't you give her her money? No, he didn't give her her money; he knew her all right. That child never got her money, she never got her money, and this man Frank, when Mrs. White came down there at 12:35, and when he jumped and when Jim Conley was still sitting down stairs,—the one fact in this case that must make you see that Jim Conley didn't do the deed,—this man Frank was at that safe then, when he jumped and Mrs. White came up, getting out the pay envelope of this little girl, who had gone back to the rear to see whether the metal had come or not—not to make water, as he stated in that note. At the time Frank was at that safe and Mrs. White came in, she says he jumped. Remember that. As she went down the stairs at 12:35 she saw Jim Conley, or a negro who resembled him, and that's the one incident in this case that shows that old Jim Conley didn't do the deed. Then it was after this man had tipped up and tipped back, —then it was, he had to let Mrs. White go up. Previously he had sent up had them to come down, but this time he lets Mrs. White go up, and then after Mrs. White had been up there a little while, and in order not to get caught in the act of moving that body, because he knew Mrs. White might come down, he knew that these men had their lunches and would work and stay up on that floor; at 12:50, Mrs. White says when she went down she saw Conley there, at 12:50, and Frank was anxious to get Mrs.

White out of the building, in order that he might call Jim Conley, if Jim had seen, and his saying that he had seen would have given him away; then it was that he wanted to get her out of the building, and he sent her upstairs and then went upstairs to get her out and pretended to be in a big hurry to get out, but according to her evidence, instead of going out, he didn't have on his coat and went back in his office and sat down at his desk. Anxious to get out,—going to close up right now! Now, that wasn't the purpose.

Talk about no blood being found back down there? Talk about no blood being found? Well, there's two reasons why there wasn't any found: This lick the girl got on the back of the head down there wasn't sufficient to have caused any great amount of blood, and if old Jim Conley hadn't dropped that girl as he went by the dressing room and the thing hadn't gone out like a sunburst all around there, like these men describe it, there wouldn't have been any blood. When you assaulted her and you hit her and she fell and she was unconscious, you gagged her with that, and then quickly you tipped up to the front, where you knew there was a cord, and you got the cord and in order to save this reputation which you had among the members of the B'nai B'rith, in order to save, not your character because you never had it, but in order to save the reputation with the Haases and the Montags and the members of Doctor Marx's church and the members of the B'nai B'rith and your kinfolks in Brooklyn, rich and poor, and in Athens, then it was that you got the cord and fixed the little girl whom you had assaulted, who wouldn't yield to your proposals, to save your reputation, because dead people tell no tales, dead people can't talk. And you talk about George Kendley saying that he would be one to lead a riot, and you talk about your ability to run George Kendley with a fan or a corn shuck. I tell you Frank knew and you know that there would have been men who would have sprung up in this town, had that little girl lived to tell the tale of that brutal assault, that would have run over ten thousand men

like you, would have stormed the jail or done anything. It oughtn't to be, because that thing ought to be left to be threshed out before an upright Court and an honest jury.

But this man Frank knew,—he didn't expect her to turn him down, he paved the way, he had set the snare and he thought that this poor little girl would yield to his importunities, but, ah! thank God, she was made of that kind of stuff to which you are a stranger, and she resisted, she wouldn't yield, you couldn't control your passion and you struck her and you ravished her, she was unconscious, you gagged her and you choked her. Then you got Mrs. White out, the woman that saw you jump at 12:35 when you were there fixing to see about little Mary's pay envelope, which you never did give the poor child. And you fussed a good deal about that pocket book, that mesh bag; I wouldn't be at all surprised if old Jim's statement that Frank had that mesh bag, didn't keep that mesh bag from turning up in this trial, just exactly like that plant of old Newt Lee's shirt and just exactly like that club and just exactly like these spots these men found on May 15th around that scuttle hole. It worried you too much, it worried you too much, it disconcerted your plans. The thing had already been done when Mrs. White got back there at 12:35 and old Jim Conley was still sitting down there waiting patiently for the signal that had been agreed upon, waiting patiently for the signals that you had used when some other women from the fourth floor and other people had been down there to meet you Saturdays and holidays. And the first thing he did after he had gagged her with a piece of her underskirt, torn from her own underskirt, was to tip up to the front, where he knew the cords hung, and come back down there and choke that poor little child to death. You tell me that she wasn't ravished? I ask you to look at the blood—you tell me that that little child wasn't ravished? I ask you to look at the drawers, that were torn, I ask you to look at the blood on the drawers, I ask you to look at the thing that held up the stockings. And I say that as sure as

you are born, that man is not like other men. He saw this girl, he coveted her; others without her stamina and her character had yielded to his lust, but she denied him, and when she did, not being like other men, he struck her, he gagged her, he choked her; and then able counsel go through the farce of showing that he had no marks on his person! Durant didn't have any marks on his person, either. He didn't give her time to put marks on his person, but in his shirt sleeves, goaded on by an uncontrollable passion, this little girl gave up her life in defense of that which is dearer than life, and you know it.

Why this man says he had an impression of a female voice saying something. How unjust! This little girl had evidently—listen at that, gentleman, this little girl whose name had appeared on the pay-roll, had evidently worked in the metal department, and never was such a farce enacted in the courthouse as this effort on the part of able counsel to make it appear that that wasn't blood up there on that floor. Absurd! Not satisfied with the absurdity of the contention that it's paint, that it's cat blood, rat's blood, varnish, they bring in this fellow Lee, who perjures himself to say that that man stood there just letting the blood drip. Old man Starnes tells you that they saw the blood there and chipped it up, and saw the blood right along on the route towards the elevator; Jim Conley tells you that right there is where he dropped the head so hard, and where Frank came and took hold and caught the feet.

Every person that described that blood and its appearance bears it out that it was caused by dropping, because it was spattered,—one big spot here and other little ones around it,—and if human testimony is to be believed, you know that was blood—that that was blood and not paint, you know that it was the blood of Mary Phagan and not the blood of Duffy. Duffy says so. You know that it was the blood of Mary Phagan because it corresponds with the manner in which Jim Conley says he dropped the body. You know it's blood because Chief Beavers saw blood there. It

spattered towards the dressing room; you know it was blood because Starnes says he saw it was blood and he saw that the haskoline had been put over it,—and I'm going to read you this man's statement, too, unless I give out physically, about this haskoline, it's the purest subterfuge that ever a man sought to palm off on an honest jury.

Starnes tells you that "I found more blood fifty feet nearer the elevator on a nail." Barrett,—Christopher Columbus Barrett, if you will, that discovered the hair that was identified, I believe, by Magnolia Kennedy, Monday morning, as soon as they began work, before anybody ever had had time to write a reward,—Barrett, who was not caught in a single lie, Barrett, who though he works for the National Pencil Company, had the manhood to stand up—I trust him and put him up against this man Holloway, who says that Jim Conley was his nigger. This man Holloway, who made a statement to me in my office, when he didn't see the purpose and the import and the force of the suggestion that this elevator key, after the elevator box was locked, was always put in Frank's office, but when it became apparent that too many people saw this man Frank Sunday morning go there and turn the lever in the power box, without going to his office to get the key, then it was that this man Holloway, who we put up and for whose veracity we vouched and who betrayed us and entrapped us, after he saw the force of the suggestion, after he had told us that always, without exception, he had locked this elevator box himself and put the key in Frank's office, throws us down and by his own affidavit as read in your presence here, made at a time when he didn't see the importance of the proposition, changed his evidence and perjured himself either to have this jury acquit this guilty defendant, his boss and employer, or to get the reward for the conviction of "his nigger," Jim Conley.

Contrast him with Barrett,—Barrett, the man who discovered the hair on his machine early in the morning and whose attention was called to this blood there by the dress-

ing room at a time when no reward is shown to have been offered and indeed, when you know that no reward was offered because no executive of this State or of this city offered any reward during Sunday or as early as 7 or 8 o'clock Monday morning. I say to you that this man Barrett stands an oasis in a mighty desert, standing up for truth and right and telling it, though his own job is at stake, and you know it. And you may fling your charges of perjury just as far as you want to, but I tell you right now, gentlemen, that Barrett, when he swore that he found blood there at the place where Conley said he dropped the body, told the truth; and when he said he found that hair on that machine, I tell you Barrett told the truth, and if there be a man in this town that rightly deserves and who ought to receive the rewards, if there are any, it's this poor employe of the National Pencil Company, who had the manhood and the courage to tell the truth, and I hope if there be such a thing as a reward to be given to anybody, that this man Barrett gets it. But not a single thing did Barrett swear but that either didn't occur before any rewards were offered, or that weren't substantiated by four and five of the most reputable witnesses that could be found. And Barrett didn't make his discoveries May 15th, either, Barrett made them Monday morning, April 8th, and they haven't any resemblance to a plant. They come so clean and so natural that the most warped and the most biased must recognize the fact that Barrett has told the truth, the whole truth and nothing but the truth.

But you can wipe Barrett out of this case and still you have got an abundance of firm ground upon which to stand. Barrett isn't shown to have lied, dodged or equivocated. Mrs. Jefferson,—and I'm only going to give you a few of the people that saw blood there—Mrs. Jefferson saw dark red spot about as large as a fan, and in her opinion, it was blood, and it was blood. Mel Stanford says he saw the blood at the dressing room Monday, dark spots that looked exactly like blood and this white stuff, haskoline, had been

smeared over it. "It was not there Friday, I know," said Mel Stanford, "because I swept the floor Friday at that place. The white substance appeared to have been swept over with a coarse broom; we have such a broom, but the one used by me Friday in sweeping over that identical spot was of finer straw; the spots were dry and the dark led right up here within five feet of where the smear was." Blood and haskoline.

Jim Conley saw her go up and didn't see her go down. Necessary, absolutely necessary, that this man should put her where he said in his telegram or letter the body was found. The discovery made Monday by Barrett and Jefferson and Mel Stanford and seen by Beavers and Starnes, but not only that, but reinforced by Darley, for Darley says "I saw what appeared to be blood spots at the dressing room, a white substance had been smeared over it, as if to hide it." And Quinn says "The spots I saw at or near the dressing room looked like blood to me."

Sometimes you have got to go into the enemy's camp to get ammunition. It's a mighty dangerous proposition,—Doctor Connally knows what a dangerous proposition it is to go into the enemy's camp to get ammunition, he has been an old soldier and he will tell you that there is no more dangerous proposition,—I expect Mr. Mangum knows something about it, this going into the enemy's camp to get ammunition; and yet in this case, conscious of the fact that we were right, having Darley tied up with an affidavit, we dared to go right into the enemy's camp, and there we got the best evidence of the fact that Frank was more nervous than he had ever been known to be except on two occasions, one when he had seen a little child killed, and the other when he and his boss had had a falling out—this man Montag, who was so afraid something was going to be twisted in this case—and also Darley saw the blood. It was a mighty hard pill for Darley, it was an awful hard situation for him, but we drove it up to him and he dared

not go back on the affidavit which he had signed, though he did modify his statements.

All right; I'm not going to call over all these other people,—Mrs. Small and others,—though Mrs. Carson denied it, she went there,—who claimed to have seen that blood. But to cap it all, Mel Stanford says "I swept the floor,"—he's an employe and he's an honest man,—"it wasn't there Friday." Why? Because old Jim, when he went to move that body, put it there Saturday. To cap it all, Doctor Claude Smith, the City Bacteriologist, says "I analyzed it and I tell you that I found blood corpuscles." And now you come in with the proposition that that blood had been there ever since that machinist Lee saw that fellow Duffy stand there with his finger cut and let it spout out at the end,—a thing Duffy says never happened, and you know never happened, and we called on you to produce the paper this man Lee said he signed and you can't do it, because he never signed one. Not only that, but your own employe, your own witness, Mary Pirk, your own witness, Julia Fuss, your own witness, Magnolia Kennedy, your own witness, Wade Campbell, and your own witness Schiff and others whose names are too numerous to take up your valuable time to mention, all say that they saw this great big spot there covered over with something white, which we know to have been haskoline.

Now, Harry Scott didn't manipulate exactly right, so they got them some new Richmonds and put them in the field, and this fellow Pierce,—and where is Pierce? Echo answers where? And where, oh, where, is Whitfield? And echo answers where? The only man you bring in here is this man McWorth. Starnes denies, Black denies, Scott denies, every witness put on the stand denies, that around that scuttle hole anything was seen immediately after that murder. Don't you know that Frank, who went through that factory,—that Schiff, Darley, Holloway, don't you know that they would have been only too glad to have reported to Frank that blood spots had been found around

that scuttle hole, and don't you know that Frank would have rushed to get his detective Scott to put the police in charge of the information that blood had been found here? But long after Jim Conley had been arrested, after this man Holloway had arrested him, after this man Holloway had said that Jim was "his nigger," realizing the desperation of the situation, realizing that something had to be forthcoming to bolster up the charge that Conley did it, then it was and not until then that this man McWorth, after he had gone looking through the factory for a whole day, at about 3:30 o'clock saw seven large stains, found the envelope and stick right there in the corner.

Now, he found too much, didn't he? Wasn't that a little too much? Is there a man on this jury that believes that all these officers looking as they did there, through that factory, going down in this basement there through that very scuttle hole, would have overlooked seven large stains which were not found there until May 15th? Scott said "I looked there just after the murder, made search at the scuttle hole, didn't see blood spots there." Starnes says the same, Rosser says the same, and these men Mel Stanford and Darley both say they had been cleaning up all that very area May 3rd, and yet the men who cleaned up and all these men never saw them and never even found the envelope or the stick. Why it's just in keeping with that plant of the shirt at Newt Lee's house. I don't care how much you mix this man Black. Boots Rogers says, Darley says, that Sunday morning, when suspicion pointed towards this man Newt Lee, that this man Frank, the brilliant Cornell graduate and the man who was so capable at making figures that certain parts of his work have never been fixed since he left that factory, when he knew a girl had been murdered down stairs, when he knew that suspicion pointed towards Newt Lee, took that slip out of the clock and stood there, looked at it, told those men, in answer to a question, if Newt Lee would have had time to have left and gone

home after he killed that girl and changed his clothing, that old Newt didn't have the time.

Why did he say it then? Because he knew that Lanford and Black and the other detectives who were there would have examined that slip for themselves, then and there, and would have seen that these punches were regular or irregular. But he stood there, and because he knew he would be detected if he tried to palm off a fraud at that time and place, this man of keen perception, this man who is quick at figures, this Cornell graduate of high standing, looked over those figures which register the punches for simply twelve hours,—not quite twelve hours,—in that presence, surrounded by those men, told them that Newt Lee wouldn't have had the time, but, ah! Monday afternoon, when he sees that there isn't enough evidence against Newt Lee, and that the thing ain't working quite as nicely against this man Gantt, who he told was familiar with this little girl, Mary Phagan, and then he suddenly proposes, after a conference with his astute counsel, Mr. Haas, that "you go out to my house and make a search," and then, in the same breath and at the same time, he shrewdly and adroitly suggests to Black that Newt Lee, he has suddenly discovered, had time to go out to his house, and forthwith, early Tuesday morning, John Black, not having been there before because Leo M. Frank told him that Newt Lee didn't have time to go out to his house, but after the information comes in then Tuesday morning, John Black puts out and goes to old Newt's house and finds a shirt; that's a plant as sure as the envelope is a plant, as the stick is a plant, as the spots around the scuttle hole. And the man that did his job, did it too well; he gets a shirt that has the odor of blood, but one that has none of the scent of the negro Newt Lee in the armpit. He puts it, not on one side, as any man moving a body would necessarily have done, but he smears it on both sides, and this carries with it, as you as honest men must know, unmistakable evidence of the fact that somebody

planted that shirt sometime Monday, at whose instance and suggestion we don't know.

And that club business: Doctor Harris says that that wound could not have been done with that club, and Doctor Hurt says it could not have been done with that club, and not a doctor of all the numerous doctors, good men and good doctors as they are for some purposes, ever denies it. A physical examination of that shirt shows you that it wasn't on the person when that blood got on it,—there is as much blood on the inside or the under side that didn't come through to the outside. Lee didn't deny the shirt, but he never did say that it was his shirt. Cornered up as he was, not a negro, one negro in a thousand, that wouldn't have denied the ownership of that shirt, but old Lee was too honest to say that it wasn't his shirt,—he didn't remember it; and you don't know whether it was his or not.

Now this envelope and this stick is found at the radiator, at the scuttle hole, May 15th, after the place had been cleaned up, according to Darley and other witnesses, including Mel Stanford, and after, as I said, it had been thoroughly searched by Scott, Campbell, Rosser, Starnes and I don't know how many others; and then you say that these things weren't a part and parcel of the same scheme that caused this man to have Conley write those notes planted by the body to draw attention away from him. Gentlemen, you can't get away from the fact that blood was there, you can't do it; now, can you? Just as honest men, now, honest men can you get away from that? If human testimony is to be believed, you've got to recognize the fact that blood was on the second floor, and that there was no blood at the scuttle hole; that the shirt and the club and the spots were plants.

"She had left the plant five minutes when Lemmie Quinn, the foreman of that plant, came in and told me I couldn't keep him away from the factory even though it was a holiday, at which time I smiled and kept on working." Smiled and kept on working! "I wanted to know when they would

have lunch, I got my house and Minola answered the phone and she answered me back that she would have lunch immediately and for me to come right away. I then gathered my papers together and went upstairs to see the boys on the top floor; this must have been, since I just looked at my watch, ten minutes to one. Mrs. White states that it was 12:35, that she passed by and saw me, that's possibly true, I have no recollection about it, perhaps her recollection is better than mine." She remembered it very well.

Now, this Minola McKnight business. Isn't it strange that this man Albert, her husband, would go up there and tell that kind of a tale if there wasn't some truth in it? Isn't it strange that Minola herself, in the tale that they seek to have you believe was a lie, should have been sustained by Mrs. Selig, when she tells you "Yes, I gave her $5.00 to go get some change," and Mrs. Frank gave her a hat? Do you believe that this husband of hers didn't see that man Frank when, after this murder, he went home and was anxious to see how he looked in the glass, but as the people had gone to the opera, anxious to get back to keep his engagement with Jim Conley? And all this talk about Mrs. Selig, about this thing not having been changed. Gentlemen, are you just going to swallow that kind of stuff without using your knowledge of human nature? And you tried to mix old Albert up, and right here, I'm going to read you a little bit about Albert's evidence: "Yes sir, he came in close to 1:30, I guess, something like that." "Did he or not eat anything?" "No sir, not at that time, he didn't, he came in and went to the sideboard in the dining room and stood there a few minutes, then he goes out and catches the car." "How long did he stay at the house?" "I suppose he stayed there five or ten minutes." "About five or ten minutes?" "About five or ten minutes." "What did he do at the sideboard?" "I didn't see him do anything at the sideboard." "Isn't there a door between the cook room and the dining room?" These gentlemen asked him, and Albert said, "Yes, this here dining room was open;" yes,

they didn't keep it shut all the time, said Albert. "And you know he didn't eat anything in that dining room?" "Yes, I know he didn't eat."

And this is the tale that had been told Craven by the husband of Minola McKnight, and Minola went down there and in the presence of her counsel, stated these things to these officers and she never would have done it if it hadn't been the truth. Gordon was down there, and he could have said—and if he hadn't said it then he's unworthy of the name of lawyer—"Minola, if these things aren't true, don't you put your name to it, if you do you are liable to go to the penitentiary for false swearing; if you don't, the writ of habeas corpus is guaranteed to every man, and in less than two hours, by an order of a judge of the Superior Court I'll have you out of here." And yet, George Gordon, with his knowledge of the law, with his knowledge of his client's rights, sits there and lets Minola McKnight, the cook, who is sustained in the statement that she then made, but which here in this presence she repudiated, corroborated by her husband and sustained in many particulars by the Seligs themselves,—George Gordon sat there and let her put her fist to that paper, swearing to a lie that might send her to the penitentiary, and he was her lawyer and could have released her from that prison by a writ of habeas corpus as quick as he could have gotten to a judge, because any judge that fails to hear a writ of habeas corpus immediately is subject to damages and impeachment.

But Craven was there and Albert was there and this woman, McKnight, sitting there in the presence of her lawyer, this man that was so eager to inject into this case something that these men wanted in here all the time, but never could get until he got on that stand and swore that I had said a thing that you saw by the questions that I asked him never did occur, that I was afraid that I would get in bad with the detectives—I would get in bad with them if I would try to run their business, and I never will get in bad with them because I never expect to undertake

to run their business; I've got as much as I can say grace over to attend to my own business. And you go out there, now, and bring in Julius Fisher and a photographer, and all these people, and try to prove this negro Albert McKnight lied, and by the mere movement of that sideboard, which Mrs. Selig in her evidence says, even, every time they swept it was put just exactly back in the same place, —then you try to break down Albert McKnight's evidence with that. Why, gentlemen, Albert says that that sideboard had been moved, and you know it had been moved, and Albert McKnight stood, not where these gentlemen sought to put him, but at a place where he could see this man Frank, who came home, there sometimes, as Albert says, between one and two o'clock, after he had murdered the girl, and didn't eat his dinner, but hurried back to the factory to keep his engagement with Jim Conley, who had promised to come back and burn her body in the furnace.

You tell me that Albert would have told that lie? You tell me that Albert's wife, in the presence of Albert and Craven and Pickett, honorable, upright men, who worked for the Beck & Gregg Company, the same firm that Albert McKnight works at,—and do you tell me that George Gordon, a man who poses as an attorney, who wants to protect the rights of his client, as he would have you see, sat there in that presence and allowed this woman, for her husband, to put her fist to a paper and swear to it which would consign her to the penitentiary? I tell you that that thing never happened, and the reason Minola McKnight made that affidavit, corroborating this man, her husband, Albert, sustained as she is by the Seligs, biased and prejudiced and willing to protect their son-in-law as they were, is because it was the embodiment of the truth and nothing but the truth; and as honest, unprejudiced, unbiased men, you know it.

And you know he didn't eat anything in that dining room, yes, I know he didn't eat. "Don't you know you can't sit in that dining room," says Mr. Arnold, "and don't

you know you can't see from the kitchen into the dining room, you know that, don't you?" "Yes sir, you certainly can see;" and the very evidence of the photographs and Julius Fischer and others who came here, after that sideboard had been moved, sustains Albert McKnight, and shows that once that sideboard is adjusted, you could see, as Albert says, and he did see because he would have never told that tale unless he had been there and seen it. "You can see in there?" "Yes sir, you can see; look in the mirror in the corner and see all over that dining room;" that's what Albert swore. And if there's anybody in the world that knows how to get up a plan to see from the kitchen into the dining room or to hear what's going on among the white folks in the dining room, it's a negro. And Albert told too straight a tale, he told too reasonable a tale. "Don't you know that you can't look in the mirror in the corner and see it?" Albert says "I did do it, I stayed there about five or ten minutes while he was there and looked in that mirror at him, Mr. Frank." "You stayed there in that kitchen on that occasion and looked in the mirror at him that five or ten minutes he stayed there?" "Yes sir." "By looking in that mirror you can see what's going on in that room?" "You can see if they are eating at the table." "Don't you know that you can't see in that room by looking into that mirror?" "Yes sir, you can see in there." "You can see all over the room?"—tried to make him say that—"No, not all over it exactly." "But you can see even when they are eating at the table?" "You can look in that mirror and see in the sitting room and through that dining room," said Albert, "to a certain extent." And he says he never was in the dining room in his life. That's reasonable. "You were right side of the back door of the kitchen?" "Yes, sir." "Let me give you a little drawing; now were you sitting right in front of that little hallway between the two rooms, in front of it?" Says Albert, "Not exactly." "You were sitting right here against the wall, weren't you?" And he said "Yes sir." "I don't know

whether it's fair or not,—that's a fair statement?" And Albert says, "I don't know whether it's fair or not, but I know I saw Leo M. Frank come in there some time between one and two o'clock Saturday, April 26th, and I know he didn't stay but about ten minutes and left to go to town." And he tells you the way in which he left, and Frank in his statement says that, while he didn't get on that car, he went in such a direction as Albert McKnight might have naturally supposed he went down there. "Minola she went in there but stayed only a minute or two in the dining room, I never looked at the clock." "You don't know exactly what time?" "No, but I know it was obliged to have been something after one when Mr. Frank came there and he came in and went before the sideboard and then went back to town." And he says "I don't know exactly whether he did or not because I have never been in the house no further than the cook room." Then he says "Who did you tell?" "I told Mr. Craven." "Who is Craven?" "He is the boss at the plow department at the Beck & Gregg Hardware Company;" and that's the way the detectives got hold of it, and try all you will to break old Albert down, I submit to you, gentlemen, that he has told the absolute truth and stands unimpeached.

August 25.

Mr. Dorsey: I regretted more than you the necessity for your being carried over another week or, rather, another Sunday. I was even more exhausted than I anticipated, and this morning my throat and voice are in such shape that I fear I will not be able to do the case the justice it demands. I thought myself, had we not had the adjournment that I might have been able to finish my speech and His Honor charge you Saturday afternoon, but I am sure such would not have been the case.

When we closed on Saturday, I was just completing a brief analysis of the statement made by this defendant. I'm not going into any exhaustive analysis of that statement, because it is not necessary to further inconvenience

you and I haven't the physical strength, but there is certain language and certain statements and assertions made in this statement by this defendant which merit some consideration. This defendant stated to you, after His Honor had excluded our evidence and properly, I think, that his wife visited him at the police station. He says that she was there almost in hysterics, having been brought there by her father and two brothers-in-law and Rabbi Marx—no, "Rabbi Marx was with me, I consulted with him as to the advisability of allowing my dear wife to come up to the top floor to see those surroundings, city detectives, reporters and snapshotters." He doesn't prove that by a living soul and relies merely upon his own statement. If they could have proven it by Rabbi Marx, who was there and advised him, why didn't they do it? Do you tell me that there lives a true wife, conscious of her husband's innocence, that wouldn't have gone through snap-shotters, reporters and everything else, to have seen him—

Mr. Arnold. I must object to as unfair and outrageous an argument as that, that his wife didn't go there through any consciousness of guilt on his part. I have sat here and heard the unfairest argument I have ever heard, and I can't object to it, but I do object to his making any allusion to the failure of the wife to go and see him; it's unfair, it isn't the way to treat a man on trial for his life.

The COURT. Is there any evidence to that effect?

Mr. Dorsey. Here is the statement I have read.

Mr. Arnold. I object to his drawing any conclusions from his wife going or not going, one way or the other, it's an outrage upon law and decency and fairness.

The COURT. Whatever was in the evidence or the statement I must allow it.

Mr. Dorsey. "Let the galled jade wince"—

Mr. Arnold. I object to that, I'm not a "galled jade," and I've got a right to object. I'm not galled at all, and that statement is entirely uncalled for.

Frank said that his wife never went back there because she was afraid that the snapshotters would get her picture—because she didn't want to go through the line of snapshotters. I tell you, gentlemen of the jury, that there never lived a woman, conscious of the rectitude and innocence of

her husband, who wouldn't have gone to him through snapshotters, reporters and over the advice of any Rabbi under the sun. And you know it. Frank says in his statement, with reference to these notes written by Conley, "I said I know he can write." How long did it take him to say it, if he ever said it. "I received many notes from him asking me to loan him money, I have received too many notes from him not to know that he can write." In other words, says Frank, in his statement, I have received notes signed with his name, purporting to have been written by him, and he says they were written by a pencil. Frank says he said "I told them if you will look in the drawer in the safe you will find the card of a jeweler from whom Conley bought a watch on the installment plan." He corroborates Conley there, with reference to the watch incident and what occurred there in his office when Conley told him not to take any more money out. "Now, perhaps if you go to that jeweler you may find some sort of receipt that Conley had to give and be able to prove that Conley can write." Scott says that no such thing ever happened. But if Frank knew so well that this man Conley could write, in the name of fairness why didn't Frank, when he saw those notes at the police station, found beside this dead body, then and there say "this is the writing of James Conley?" Why didn't he do it? Scott denies that any such thing happened, or that they came into possession of any information from Frank that led to knowledge on their part that this man Conley could write. And up to the time that they discovered this man Conley could write, this man had kept his mouth sealed and it was only the knowledge on the part of the detectives and the knowledge on the part of Conley that the detectives knew he was lying about his ability to write, that forced him to make the first admission that he was connected with this crime. He says he knew that Conley could write. Why, then, did he keep his mouth shut until the detectives discovered it, when he knew that the notes found beside that poor girl's body was the one key that was going to unlock the Phagan mystery?

You know why. Ah, you did know that Conley could write. You knew it, not only because he wrote the notes for you, through which you sought to place the responsibility for this crime on another man, but you knew it because he checked up the boxes of pencils, and he had written you numerous notes to get money from you, just like he borrowed money from those other people in that factory. You knew that the most powerful fact that could be brought to light showing who committed this dastardly crime was to find who penned the notes placed with the body; and yet, although you saw them, according to your own statement, at police headquarters and saw them there the very Sunday morning that the crime was committed, not a word, not a word, although the notes themselves said that the crime was done by a negro. It is not necessary to discuss that further.

Frank says, with reference to this visit of Conley to the factory, after Conley had gone through over yonder and demonstrated in detail, as told you by Branch, and in the same length of time and almost to the minute that Conley himself says it took, too, though Conley only knows the clock registered four minutes to one and don't know anything about the balance of the time, he says, with reference to the visit of Conley to the jail, when Conley wanted to confront him, "I told them if they got the permission, I told them through my friend Mr. Klein, that if they got the permission of Mr. Rosser to come, I would speak to them, would speak to Conley and face him or anything they wanted, if they got the permission of Mr. Rosser. Mr. Rosser was on that day up at Tallulah Falls trying a case." But Mr. Rosser got back, didn't he? Mr. Rosser didn't remain at Tallulah Falls.

I tell you, gentlemen of the jury, measuring my words as I utter them, and if you have sense enough to get out of a shower of rain you know it's true, that never in the history of the Anglo-Saxon race, never in the history of the African race in America, never in the history of any other race, did an ignorant, filthy negro, accuse a white man of a crime and

that man decline to face him. And there never lived within the State of Georgia, a lawyer with one-half the ability of Mr. Luther Rosser, who possessed a consciousness of his client's innocence, that wouldn't have said "Let this ignorant negro confront my innocent client." If there be a negro who accuses me of a crime of which I am innocent. I tell you, and you know it's true, I'm going to confront him, even before my attorney, no matter who he is, returns from Tallulah Falls, and if not then, I tell you just as soon as that attorney does return, I'm going to see that that negro is brought into my presence and permitted to set forth his accusations.

You make much here of the fact that you didn't know what this man Conley was going to say when he got on the stand. You could have known it, but you dared not do it.

Mr. Rosser. May it please the Court, that is an untrue statement; at that time, when he proposed to go through that dirty farce, with a dirty negro, with a crowd of policemen, confronting this man, he made his first statement—his last statement, he said, and these addendas nobody ever dreamed of them, and Frank had no chance to meet them; that's the truth. You ought to tell the truth, if a man is involved for his life; that's the truth.

Mr. Dorsey. It does not make any difference about your addendas, and I'm going to put it right up to this jury—

Mr. Rosser. May it please the Court, have I got the right to interrupt him when he mis-states the facts?

The COURT. Whenever he goes outside of the record.

Mr. Rosser. Has he got the right to comment that I haven't exercised my reasonable rights?

The COURT. No, sir, not if he has done that.

Mr. Rosser. Nobody has got a right to comment on the fact that I have made a reasonable objection.

Mr. Dorsey. But I'm inside of the record, and you know it, and the jury knows it. I said, may it please Your Honor, that this man Frank declined to be confronted by this man Conley.

Mr. Rosser. That isn't what I objected to; he said that at that meeting that was proposed by Conley, as he says, but really proposed by the detectives, when I was out of the city, that if that had been met, I would have known Conley's statement, and that's not true; I would not have been any wiser about his statement than I was here the other day.

The COURT. You can comment upon the fact that he refused to meet Frank or Frank refused to meet him, and at the time he did it, he was out of the city.

Mr. Arnold. We did object to that evidence, Your Honor, but Your Honor let that in.

The COURT. I know; go on.

Mr. Dorsey. They see the force of it.

Mr. Rosser. Is that a fair comment, Your Honor, if I make a reasonable objection, to say that we see the force of it?

The COURT. I don't think that, in reply to your objection, is a fair statement.

Mr. Dorsey. Now, may it please Your Honor, if they don't see the force of it, you do—

Mr. Rosser. I want to know, is Your Honor's ruling to be absolutely disregarded like that?

The COURT. Mr. Dorsey, stay inside of the record, and quit commenting on what they say and do.

Mr. Dorsey. I am inside of the record, and Your Honor knows that's an entirely proper comment.

Mr. Rosser. Your Honor rules—he says one thing and then says Your Honor knows better—

Mr. Dorsey. Your Honor knows I have got a right to comment on the conduct of this defendant.

The COURT. Of course, you have, but when they get up, I don't think you have any right to comment on their objections as they are making them to the Court.

Mr. Dorsey. I don't.

The COURT. No, I don't think so.

Mr. Dorsey. Isn't everything that occurs in the presence of the Court the subject matter for comment?

The COURT. No, I don't think you can comment on these things. You can comment on any conduct within the province of this trial, but if he makes an objection that's sustained, why, then, you can't comment on that.

Mr. Dorsey. Does Your Honor say I'm outside of the record?

The COURT. No, I don't, but I say this, you can comment on the fact that Frank refused to meet this man, if that's in the record, you have a right to do that.

This man Frank, a graduate of Cornell, the superintendent of the pencil factory, so anxious to ferret out this murder that he had phoned Schiff three times on Monday, April 28th, to employ the Pinkerton Detective Agency, this white man refused to meet this ignorant negro, Jim Conley. He refused upon the flimsy pretext that his counsel was out of town, but when his counsel returned, when he had the opportunity to know at least something of the accusations that Conley brought against this man, he dared not let him meet him. It is unnecessary to take up time discussing that. You tell me that the weakest among you, if you were innocent and a man of black skin charges you with an infamous

murder, that any lawyer, Rosser or anybody else, could keep you from confronting him and nailing the lie? No lawyer on earth, no lawyer that ever lived in any age or any clime could prevent me, if I were innocent, from confronting a man who accused me wrongfully, be he white or black.

And you, Leo Frank, went in and interviewed Newt Lee down yonder at twelve o'clock, Tuesday night, April 29th. And what did you do? Did you act like a man who wanted to get at the truth, who didn't know it and wanted to get at the truth? Ah, no. Instead of going into that room and taking up with this negro Newt Lee, the man towards whom you had directed suspicion infamously to save your own neck, a man that you would have seen hung on the gallows in order to save your reputation with the people on Washington street and the members of the B'nai B'rith, did you make an earnest, honest, conscientious effort, as an innocent employer would with his employee, to get at the truth?

No; according to Lee, you hung your head and quizzed him not, but predicted that both Lee and you would go to hell if Lee continued to tell the story which he tells even until this good day: and then in your statement here, try to make it appear that your detective Scott and old John Black concocted a scheme against you and lied as to what occurred on that Tuesday night. The reason why Frank didn't put it up to Newt Lee and try to get Newt Lee to tell him how that murder occurred and what he knew about it, was because Frank knew that Lee was innocent, that he was the murderer and that he was adding to the dastardly crime of assault upon the virtue of this girl, was adding to the crime of murder of this girl, another infamous effort to send this negro to the gallows in order to save his reputation and neck.

Listen to this—he's smart, and just listen how, in his statement, he qualifies and fixes it up so that, when we come back with rebuttal, the technical law will protect him: "They (meaning the detectives) stress the possibility of couples having been let into the factory at night"—by night watchmen? No,—"By night Watchman Newt Lee." Lee

had been there but two or three weeks,—three weeks. Frank could have told you that the detectives stressed the fact that couples went in there holidays, Saturdays and at nights, at all times and at any time when other night watchmen were there, but Newt Lee, having been there but three weeks, he effectively shuts off the State from impeaching his statement or contradicting it, and therefore, he tells you that the detectives stressed the fact that couples had been in here while the night watchman Newt Lee, was watching,—and Newt had been there but three weeks.

That wasn't the period, that wasn't the time. During that three weeks that old Newt was night watching, there was but one person for whom your passion burned, and that was Mary Phagan. And she wouldn't meet you, and she didn't meet you any time during that period that Newt Lee was night watching. But in the summer previous, when Dalton was seen to go there, if it be not true that couples were admitted, why didn't you make the bold, emphatic, challenging statement that at no time were couples ever admitted? And then you tell me that that's a good statement and a fair statement and a frank statement?

Now, another thing. Liston to this—I read from the defendant's statement: "Now, with reference to these spots that are claimed to be blood and that Mr. Barrett found, I don't claim they are not blood, they may have been, they were right close to the ladies' dressing room, and we have accidents there, and by the way, in reference to those accidents, the accidents of which we have records are not the only accidents that have happened there. Now, we use paint and varnish around there, a great deal of it, and while I don't say that this is not blood, it may be, but it could also have been paint; I have seen the girls drop bottles of paint and varnish and have them break there on the floor, I have seen that happen right close to that spot. If that had been fresh red paint or if it had been fresh red blood and that haskoline compound, that soap in it which is a great solvent, had been put on there in the liquid state, it wouldn't have

shown up white, as it showed up then, but it would have showed up either pink or red."

Now, first, contrast that statement for a moment with this statement with reference to the condition of the floor where Barrett worked. There he says there wasn't a spot, much less a blood spot,—"looked at the machinery and the lathe, looked at the table on which the lathe stands and the lathe bed and the floor underneath the lathe and there wasn't a spot, much less a blood spot underneath." All right; you say that that wasn't blood, you say that that haskoline wouldn't turn that color. In the name of goodness, in the name of truth, I ask you, if that haskoline mixed with that blood on the second floor wouldn't have produced the identical result that these witnesses have sworn, if it be true, as Mr. Rosser stated, that you don't attach any importance to the cabbage findings and experiments made in this case, why didn't you devote a little of your time to bringing before this jury a reputable chemist and a man who could sustain you in that statement? You had that evidence in your possession, or if you were able to bring in these medical experts here to tear down the powerful evidence of Dr. Roy Harris, as eminent an authority as lives in the State of Georgia, in the name of truth and fair play, before you men who ought to have every fact that will enable you to get at the truth, why didn't you bring one chemist to sustain you? There's but one answer, and you know what it is. Those spots were blood, they were blood over which had been placed that substance, haskoline, and the color that blood and haskoline would make upon that floor was the identical color found there by the numerous witnesses who saw it. Important? There is no more important fact for you to have shown than that this haskoline, when wiped over blood, would have made a color the like unto which Frank in his statement would have you believe would have been made.

Are you going to accept the statement of this man, with all these circumstances unsupported by chemists or anybody on earth, because they couldn't get them to come in and stul-

tify themselves on that point, as against the evidence of all these witnesses who have told you that that was blood, and against the evidence of Doctor Claude Smith, the City Bacteriologist of the City of Atlanta, who tells you that through a chemical analysis he developed the fact that that was blood?

This defense, gentlemen—they have got no defense, they never have come into close contact in this case, except on the proposition of abuse and villification. They circle and flutter but never light; they grab at varnish and cat's blood and rat's blood and Duffy's blood, but they never knuckle down and show this jury that it wasn't blood; and in view of the statement of that boy, Mel Stanford, who swept that floor Friday afternoon, in view of the statement of Mrs. Jefferson, in view of the statement of "Christopher Columbus" Barrett, who tells the truth, notwithstanding the fact that he gets his daily bread out of the coffers of the National Pencil Company, you know that that was the blood of this innocent victim of Frank's lustful passion.

The defense is uncertain and indistinct on another proposition, they flutter and flurry but never light when it comes to showing you what hole Jim Conley pushed his victim down. Did he shoot her back of that staircase back there? No. Why? Because the dust was thick over it. Because unimpeached witnesses have shown you it was nailed down; because if he had shot her down that hole, the boxes piled up there to the ceiling would have as effectively concealed her body as if she had been buried in the grave, for some days or weeks. Did he shoot her down this other hole in the Clark Woodenware Company's place of business? Where even if what Schiff says is true, that they kept the shellac there, it would nevertheless have concealed her body a longer time than to put it down there by the dust bin where the fireman and people were coming in through the back door. Did this negro, who they say robbed this girl, even if he had taken the time to write the notes, which, of course, he didn't —even after he had knocked her in the head with that bludgeon, which they tell you had blood on it, and robbed

her, even if he had been such a fool and so unlike the other members of his race, by whom brutal murders have been committed, should have taken time to have tied a cord around her neck, a cord seldom found down there in the basement, according to your own statement, except when it's swept down in the trash, but a cord that hangs right up there on the office floor, both back there in the varnish room and up there in the front. If he had done all that,—a thing you know that he didn't do, after he had shot her down in that hole in the Clark Woodenware Company, down there in that wing of the place where they keep this shellac, if they do keep it, why would that negro have gone down there and moved her body, when she was more securely fixed down there? And why was it, will you tell me, if he shot her down that scuttle hole, that he wrote the notes and fixed the cord, and will you tell me how it happens that, when after this man Holloway, on May 1st, had grabbed old Jim Conley, when he saw him washing his shirt and said "he's my nigger,"—fifteen days afterwards, when squad number two of the Pinkerton people had been searching through that factory a whole day and right down in that area, the elevator being run, the detectives, both the Pinkertons and the city force had looked around there immediately after the crime, will you tell me how it happened that, if he shot her down that hole, that there was so much blood not found until the 15th of May, and more blood than that poor girl is ever shown to have lost?

Another thing: This man Frank says that "Mr. Quinn said he would like to take me back to the metal department on the office floor, where the newspapers that morning stated that Mr. Barrett of the metal department had claimed he had found blood spots, and where he had found some hair." Although he had seen in the morning papers that this man Barrett claimed to have seen blood there, before he went back to see it, although this thing tore him all to pieces, and although he was anxious to employ a detective,—so anxious that he phoned Schiff three times to get the Pinkertons

down, according to his own statement, Lemmie Quinn had to come and ask him back to see the blood spots on the second floor, found by this man Barrett.

Is that the conduct of a man, the head of a pencil factory, who had employed detectives, anxious to assist the police,—saw it in the newspapers and yet Lemmie Quinn had to go and ask him to go back? And then he tells you in this statement, which is easy to write, was glibly rattled off, a statement that you might expect from a man that could plot the downfall of a girl of such tender years as little Mary Phagan, that he went back there and examined those blood spots with an electric flashlight, that he made a particular and a minute examination of them, but strange to say, not even Lemmie Quinn comes in to sustain you, and no man on earth, so far as this jury knows, ever saw Leo M. Frank examining what Barrett said and Jefferson said and Mel Stanford said and Beavers said and Starnes said and a host of others said was blood near the dressing room on the second floor. You know why? Because it never happened. If there was a spot on this earth that this man Frank didn't want to examine, if there was a spot on earth that he didn't want any blood found at all, it was on the second floor, the floor which, according to his own statement, he was working on when this poor girl met her death.

Schiff, he says, saw those notes down there and at police headquarters. Frank says he visited the morgue not only once but twice. If he went down there and visited that morgue and saw that child and identified her body and it tore him all to pieces, as he tells you it did, let any honest man, I don't care who he be, on this jury, seeking to fathom the mystery of this thing, tell me why it was, except for the answer that I give you, he went down there to view that body again? Rogers said he didn't look at it; Black said he didn't see him look at it.

Mr. Rosser. He is mis-stating the evidence. Rogers never said that he didn't look at the body, he said he was behind him and didn't know whether he did or not; and Black said he didn't know whether he did or not.

Mr. Dorsey. Rogers said he never did look at that body.

Mr. Arnold. I insist that isn't the evdence. Rogers said he didn't know and couldn't answer whether he saw it or not, and Black said the same thing.

I'm not going to quibble with you. The truth is, and you know it, that when that man Frank went down there to look at that body of that poor girl, to identify her he never went in that room, and if he did look at her long enough to identify her, neither John Black nor Rogers nor Gheesling knew it. I tell you, gentlemen of the jury, that the truth of this thing is that Frank never looked at the body of that poor girl, but if he did, it was just a glance, as the electric light was flashed on and he immediately turned and went into another room.

Mr. Rosser. There isn't a bit of proof that he went into another room, I object again, sir, there isn't a particle of proof of that.

If that man Frank ever looked at that girl's face,—I challenge them to produce the record to show it,—it was so brief that if she was dirty and begrimed and her hair was bloody and her features contorted, I tell you that, if he didn't know her any better than he would have you believe he knew her, he never could have identified her as Mary Phagan. Never could. And I say to you, gentlemen of the jury, that the reason why this man revisited that morgue on Sunday afternoon, after he had failed to mention the subject of death in the bosom of his family at the dining table, when he tells you that it tore him all to pieces, there was but one reason for revisiting that morgue, and that was to put his ear to the ground and see if at that hour there was any whisper or suggestion that Leo M. Frank, the guilty man, had committed the dastardly deed.

Black didn't see him, Rogers didn't see him, Gheesling didn't see him. One of the earliest to arrive, the superintendent of the factory (Rogers said he had his eye on him) he turned and stepped aside, and he himself said that the sight tore him all to pieces, and he seeks to have you believe that that automobile ride and the sight of that poor girl's fea-

tures accounts for the nervousness which he displayed; and yet we find him going, like a dog to his vomit, a sow to her wallow, back to view the remains of this poor little innocent girl. And I ask you, gentlemen of the jury, if you don't know that the reason Leo M. Frank went down to that morgue on Sunday afternoon was to see if he could scent anything in the atmosphere indicating that the police suspected Leo M. Frank? He admits his nervousness, he admits his nervousness in the presence of the officers; the Seligs say that he wasn't nervous, that he wasn't nervous Saturday night when he telephoned Newt Lee to find out if anything had happened at the factory, that he wasn't nervous when he read this Saturday Evening Post.

He wanted to get out of the view of any man who represented the majesty and dignity of the law, and he went in behind curtains or any old thing that would hide his countenance from those men.

I come back to the proposition in the bosom of his family, —notwithstanding he read that Saturday Evening Post out there in the hall Saturday night, this thing kept welling in his breast to such an extent that he had to make a play of being composed and cool, and he went in there and tried to break up the card game with the laughter that was the laughter of a guilty conscience. Notwithstanding the fact that he was able, Sunday, at the dining table and in the bosom of his family, when he hadn't discussed this murder, when Mrs. Selig didn't know that it was a murder that concerned her, when the whole Selig household were treating it as a matter of absolute indifference, if he wasn't nervous there, gentlemen of the jury, surely he was, as I am going to show you, nervous when he came face to face and had to discuss the proposition with the minions of the law.

He was nervous when he went to run the elevator, when he went to the box to turn on the power, and he says here in his statement, unsupported by any oath, that he left that box open because some member of the fire department had come around and stated that you must leave that box open because

the electricity might innocently electrocute some members of the fire department in case of fire. I ask you, gentlemen of the jury, what was the necessity for leaving the box open when a simple turn of the lever would have shut off the electricity and enabled the key to have been hung up in the office, just exactly like old Holloway swore when he didn't know the importance of the proposition, in the affidavit which I have and which was submitted in evidence to you, that that box was locked and the key was put in Frank's office? Why don't they bring the fireman here who went around and gave such instructions? First, because it wasn't necessary, they could have cut the electricity off and locked the box. And second, they didn't bring him because no such man ever did any such thing, and old Holloway told the truth before he came to the conclusion that old Jim Conley was "his nigger" and he saw the importance of the proposition that when Frank went there Sunday morning the box was unlocked and Frank had the key in his pocket.

Mr. Rosser. You say Mr. Frank had the key in his pocket? No one mentioned it, that isn't the evidence; I say it was hung up in the office, that's the undisputed evidence.

Mr. Dorsey. Holloway says when he got back Monday morning it was hung up in the office, but Boots Rogers said this man Frank—and he was sustained by other witnesses—when he came there to run that elevator Sunday morning, found that power box unlocked.

Mr. Rosser. That's not what you said.

Mr. Dorsey. Yes it is.

Mr. Rosser. You said Frank had the key in his pocket next morning, and that isn't the evidence, there's not a line to that effect.

The COURT. Do you still insist that he had it in his pocket?

Mr. Dorsey. I don't care anything about that; the point of the proposition, the gist of the proposition, the force of the proposition is that old Holloway stated, way back yonder in May, when I interviewed him, that the key was always in Frank's office; this man told you that the power box and the elevator was unlocked Sunday morning and the elevator started without anybody going and getting the key.

Mr. Rosser. That's not the point he was making, the point he was making, to show how clearly Frank must have been connected with it, he had the key in his pocket. He was willing to say that when he ought to know that's not so.

The COURT. He's drawing a deduction that he claims he's drawing.

Mr. Rosser. He doesn't claim that. He says the point is it was easily gotten in the office, but that's not what he said.

The COURT. You claim that's a deduction you are drawing?

Mr. Dorsey. Why, sure.

The COURT. Now, you don't claim the evidence shows that?

Mr. Dorsey. I claim that the power box was standing open Sunday morning.

The COURT. Do you insist that the evidence shows he had it in his pocket?

Mr. Dorsey. I say that's my recollection, but I'm willing to waive it; but let them go to the record, and the record will sustain me on that point, just like it sustains me on the evidence of this man Rogers, which I'm now going to read.

Rogers said "Mr. Gheesling caught the face of the dead girl and turned it over towards me; I looked then to see if anybody followed me, and I saw Mr. Frank step from outside of the door into what I thought was a closet, but I afterwards found out where Mr. Gheesling slept, or somebody slept, there was a little single bed in there."

I don't want to misrepresent this testimony, for goodness knows there's enough here without resorting to any such practice as that, and I don't want to mislead this jury and furthermore, I'm not going to do it. Frank says, after looking at the body, "I identified that little girl as the one that had been up shortly after the noon of the day previous and got her money from me. I then unlocked the safe and took out the pay roll book and found that it was true that a little girl by the name of Mary Phagan did work in the metal plant and that she was due to draw $1.20, the pay roll book showed that, and as the detective had told me that some one had identified the body of that little girl as that of Mary Phagan, there could be no question but what it was one and the same girl." And he might have added, "as I followed her back into the metal department and proposed to her that she submit to my lascivious demands, I hit her, she fell, she struck her head; to protect my character, I choked her—to protect my reputation I choked her, and called Jim Conley to move her down to the basement, and for all these reasons, because I made out the pay roll for fifty-two weeks during which time Mary had worked there, I know, for these reasons, al-

though I didn't look at her and couldn't have recognized her if she was in the dirty, distorted condition," he tells you in this statement, she really was, "but I know it was Mary Phagan."

And he corroborates in his statement these detectives, he says down at the undertaking establishment, "went down a long dark passageway with Mr. Rogers following, then I came and Black brought up the rear, Gheesling was on the opposite side of the little cooling table, the table between him and me; he took the head in his hands, put his finger exactly where the wound in the left side back of the head was located;" and he seeks to have you believe that he "noticed the hands and arms of the little girl were very dirty, blue and ground with dirt and cinders, nostrils and mouth,—the mouth being open,—nostrils and mouth just full of saw-dust, the face was all puffed out, the right eye was blackened and swollen and there was a deep scratch over the left eye on the forehead." He tells in his statement that in that brief glance, if he ever took any glance at all, he saw that. The only way in the world to believe him is to say that these men, John Black and Boots Rogers, who have got no interest in this case in God's world but to tell the truth, perjured themselves to put the rope around the neck of this man. Do you believe it? Starnes is a perjurer, too? Starnes says "when I called this man up over the telephone I was careful not to mention what had happened;" and unless Starnes on that Sunday morning in April was very different from what you would judge him to be by his deportment on the stand here the other day, he did exactly what he said he did. And yet this defendant in his statement said he says "what's the trouble, has there been a fire?" He says "No, a tragedy, I want you to come down right away;" "I says all right;" "I'll send an automobile after you," and Starnes says that he never mentioned the word tragedy, and yet, so conscious, so conscious was this man Frank when Rogers and Black went out there and he nervously twitching at his collar, "What's the trouble, has the night watchman reported anything,"

asked them not, "has there been a fire," but "has there been a tragedy?" But Starnes, the man who first went after Newt Lee, the negro night watchman, because he pointed his finger of suspicion at him,—Starnes, the man who went after Gantt because this defendant pointed the finger of suspicion at him,—Starnes, the man who has been a detective here on the police force for years and years, is a perjurer and a liar; to do what? Simply to gratify his ambition and place a noose around the neck of this man Frank, when he could have gone out after, if the circumstances had warranted it, or if he had been a rascal and wanted to travel along the line of lest resistance, Newt Lee or Gantt or Conley.

Another thing: Old Newt Lee says that when this defendant called him Saturday night, a thing that he had never done during the time that he had been there at that pencil factory serving him as night watchman, Newt Lee tells you, although the defendant says that he asked about Gantt, Newt Lee says that Gantt's name was never mentioned, and that the inquiry was "has anything happened at the factory?"

You tell me, gentlemen of the jury, that all these circumstances, with all these incriminating circumstances piling up against this man that we have nothing in this case but prejudice and perjury?

Newt says he never mentioned Gantt. Frank in his statement says "I succeeded in getting Newt Lee, and asked him if Mr. Gantt had gone." He instructed this man Newt Lee to go with Gantt, to watch him, to stay with him, and old Newt Lee wouldn't even let Gantt in that factory unless Frank said that he might go up. He had instructed Lee previous thereto not to let him in for the simple reason he didn't want Gantt coming down there. Why? Because he didn't want him to come down and see and talk with little Mary for some reason I know not why; and old Newt Lee stopped this man Gantt on the threshold and refused to let him go up, and this man Frank says "you go up with him and see that he gets what he wants and usher him out." And yet, though he had never done any such thing during the time Newt Lee

had been up there, he innocently called Newt up to find out, he said, if Gantt had gone and Newt said to find out if everything was all right at the factory; and you know that the reason he called up was to find out if Newt, in making his rounds, had discovered the body of this dead girl.

"Would you convict him on this circumstance or that circumstance?" No. But I would weave them all together, and I would make a rope, no one strand of which sufficiently strong to send this man to the gallows for this poor girl's death, but I would take them all together and I would say, in conformity with the truth and right, they all make such a rope and such a strand and such a cable that it's impossible not only to conceive a reasonable doubt, but to conceive any doubt at all.

Frank was in jail, Frank had already stated in his affidavit at police headquarters, which is in evidence, contradicting this statement and this chart which they have made, that he didn't leave his office between certain hours. Frank didn't know that his own detective, Harry Scott, had found this little Monteen Stover,—and I quote her evidence, I quote it and I submit it shows that she went in that office and went far enough in that office to see who was in there, and if she didn't go far enough in, it's passing strange that anybody in that office,—Frank himself, could have heard that girl and could have made his presence known. Scott, their own Pinkerton detective, gets the statement from Monteen Stover, and he visits Leo M. Frank in his cell at the jail. Frank in order to evade that says, "to the best of my recollection I didn't stir out of the office, but it's possible that, in order to answer a call of nature, I may have gone to the toilet, these are things that a man does unconsciously and can't tell how many times nor when he does it."

I tell you, gentlemen of the jury, that if this man Frank had remained in his office and was in his office when Monteen Stover went in there, he would have heard her, he would have seen her, he would have talked with her, he would have given her her pay. I tell you, gentlemen of the jury, that if

this man Frank had stepped out of his office to answer a call of nature, that he would have remembered it, and if he wouldn't have remembered it, at least he wouldn't have stated so repeatedly and unqualifiedly that he never left his office, and only on the stand here, when he faces an honest jury, charged with the murder, and circumstances banked up against him, does he offer the flimsy excuse that these are things that people do unconsciously and without any recollection. But this man Scott, in company with Black, after they found that little Monteen Stover had been there at exactly the time that old Jim Conley says that that man with this poor little unfortunate girl had gone to the rear, and on May 3rd, the very time that Monteen Stover told them that she had been up there, at that time this Pinkerton detective, Scott, as honest and honorable a man as ever lived, the man who said he was going hand in hand with the police department of the City of Atlanta and who did, notwithstanding the fact that some of the others undertook to leap with the hare and run with the hounds, stood straight up by the city detectives and by the State officials and by the truth, put these questions, on May 3rd, to Leo M. Frank: says he to Frank:

"From the time you got to the factory from Montag Brothers, until you went to the fourth floor to see White and Denham, were you inside your office the entire time?" Answer: "I was." Again, says Scott—and Mr. Scott, in jail, when Frank didn't know the importance of the proposition because he didn't know that little Monteen Stover had said that she went up there and saw nobody in his office—Scott came at him from another different angle: "From the time you came from Montag Brothers, until Mary Phagan came, were you in your office?" and Frank said "yes." "From twelve o'clock," says Scott, "until Mary Phagan entered your office and thereafter until 12:50, when you went upstairs to get Mrs. White out of the building, were you in your office?" Answer: "Yes." "Then," says Scott, "from twelve to twelve-thirty, every minute during that half hour,

you were in your office?" and Frank said "yes." And not until he saw the wonderful capacity, the wonderful ability, the wonderful devotion of this man Scott to the truth and right did he ever shut him out from his counsel. No suggestion then that he might have had to answer a call of nature, but emphatically, without knowing the importance, he told his own detective, in the presence of John Black, that at no time, for no purpose, from a few minutes before this unfortunate girl arrived, until he went upstairs, at 12:50, to ask Mrs. White to leave, had he been out of his office.

Then you tell me that an honest jury, with no motive but to do right, would accept the statement of this man Frank, that he might have been, these things occur so frequently that a man can't remember, and by that statement set aside what he said to his own detective, Harry Scott? Well, you can do it; you have got the power to do it; no king on the throne, no potentate has the power that is vested in the American jury. In the secret of your consultation room, you can write a verdict that outrages truth and justice, if you want to, and no power on earth can call you to account, but your conscience, but so long as you live, wherever you go, that conscience has got to be with you,—you can't get away from it; and if you do it, you will lose the peace of mind that goes with a clear conscience of duty done, and never again, so long as you shall last upon this earth, though others not knowing the truth might respect you, will you ever have your own self-esteem.

I have already talked to you about this time element. You made a mighty effort to break down little George Epps. You showed that McCoy didn't have a watch; have tried to show this man Kendley was a liar because he knew the little girl and felt that he knew in his heart who the murderer was. But there's one witness for the State against whom not a breath of suspicion has been apparent,—we impeached these men Matthews and Hollis by other witnesses besides George Epps and besides George Kendley and besides McCoy, and as to how that little girl got to that factory, gentlemen, this

man Mr. Kelley, who rode on the same car with Hollis, the same car that Hollis claims or Matthews claims that he rode on, knew the girl, knew Matthews, tells you and he's unimpeached and unimpeachable, and there's no suggestion here, even if you set the evidence of Epps and McCoy and Kendley aside, upon which an honest jury can predicate a doubt that this man Kelley of the street car company didn't tell the truth when he says that she wasn't on that car that this man Matthews says she was and she went around, because "I rode with Matthews and I know her and I know Matthews."

And Mr. Rosser says that he don't care anything about all this medical evidence,—he don't care anything about cabbage. I'm not going back on my raising here or anywhere, and I tell you, gentlemen, that there is no better, no more wholesome meal, and when the stomach is normal and all right, there is nothing that is more easily digested, because the majority of the substances which you eat takes the same length of time that cabbage requires. And I tell you that cabbage, corn bread and buttermilk is good enough for any man. I tell you, gentlemen of the jury, that Mr. Rosser's statement here, that he don't care anything for that evidence of Doctor Roy Harris about this cabbage which was taken out of that poor girl's stomach, is not borne out by the record in this case. It wouldn't surpise me if these able, astute gentlemen, vigilant as they have shown themselves to be, didn't go out and get some doctors who have been the family physicians and who are well known to some of the members of this jury, for the effect that it might have upon you.

Mr. Arnold. There is not a word of evidence as to that; it is a grossly improper argument, and I move that that be withdrawn from the jury.

Mr. Dorsey. I don't state it as a fact, but I am suggesting it.

Mr. Arnold. He has no right to deduct it or suggest it, I just want Your Honor to reprove it—reprimand him and withdraw it from the jury; I just make the motion and Your Honor can do as you please.

I am going to show that there must have been something besides the training of these men, and I'm going to contrast them with our doctors.

Mr. Arnold. I move to exclude that as grossly improper. He says he is arguing that some physician was brought here because he was the physician of some member of the jury, it's grossly unfair and it's grossly improper and insulting, even, to the jury.

Mr. Dorsey. I say it is eminently proper and absolutely a legitimate argument.

Mr. Arnold. I just record my objection, and if Your Honor lets it stay in, you can do it.

Mr. Dorsey. Yes, sir; that wouldn't scare me, Your Honor.

The COURT. Well, I want to try it right, and I suppose you do. Is there anything to authorize that inference to be drawn?

Mr. Dorsey. Why sure; the fact that you went out and got general practitioners, that know nothing about the analysis of the stomach, know nothing about pathology.

The COURT. Go on, then.

Mr. Dorsey. I thought so.

Mr. Arnold. Does Your Honor hold that is proper—"I thought so?"

The COURT. I hold that he can draw any inference legitimately from the testimony and argue it—I do not know whether or not there is anything to indicate that any of these physicians was the physician of the family.

Mr. Rosser. Let me make the suggestion, Your Honor ought to know that before you let him testify it.

The COURT. He says he does not know it, he's merely arguing it from an inference he has drawn.

I can't see any other reason in God's world for going out and getting these practitioners, who have never had any special training on stomach analysis, and who have not had any training with the analysis of tissues, like a pathologist has had, except upon that theory. And I am saying to you, gentlemen of the jury, that the number of doctors that these men put up here belie the statement of Mr. Rosser that he doesn't attach any importance to this cabbage proposition, because they knew, as you know, that it is a powerful factor in sustaining the State's case and breaking down the alibi of this defendant. It fastens and fixes and nails down with the accuracy only which a scientific fact can do, that this little girl met her death between the time she entered the office of the superintendent and the time Mrs. White came up the stairs at 12:35, to see her husband and found this defendant at the safe and saw him jump. You tell me that this Doctor Childs, this general practitioner, who don't

know anything about the action of the gastric juices on foods in the stomach, this man of the short experience of seven years, this gentleman, splendid gentleman though he is, from Michigan, can put his opinion against the eminent Secretary of the Georgia Board of Health, Doctor Roy Harris? I tell you no.

Now, briefly, let's run over this nervousness proposition. The man indicated nervousness when he talked to old man John Starnes, when Black went out to his house and he sent his wife down to give him nerve, although he was nearly dressed and she wasn't at all dressed, he betrayed his nervousness by the rapidity of his questions, by the form of his questions. But first, before we get to that, he warned old Newt Lee to come back there Saturday at four o'clock, and dutiful old darkey that he was, old Newt walked in and Frank then was engaged in washing his hands. Jim Conley hadn't come, but he was looking for Conley, and he sent old Newt Lee out, although Newt insisted that he wanted to sleep, and although he might have found a cozy corner on any floor in that factory, with plenty of sacks and cords and other things to make him a pallet, he wanted old man Newt to leave. Why? When Newt said he was sleepy he wanted him to leave so that he could do just exactly what old Jim Conley told you Frank made his promise to do,—he wanted an opportunity to burn that body, so that the City Police of Atlanta wouldn't have the Phagan mystery solved today, and probably it would not even be known that the girl lost her life in that factory.

His anxiety about Gantt going back into that building that afternoon, when he hung his head and said to Gantt that he saw a boy sweeping out a pair of shoes, and Gantt says "what were they, tan or black?" And ah, gentlemen, it looked like Providence had foreordained that this old, long-legged Gantt should leave, not only one pair, but two pairs. "What kind were they," he said; he gave him the name of one color, and then, as Providence would have it, old Gantt said, "ah, but I've got two pair," and then it

was that he dared not say, because he couldn't then say, that he saw that man also sweeping them out; then it was that he said "all right, Newt, go up with him and let him get them," and lo and behold, the shoes that this man Frank would have him believe were swept out, both tan and black were there. Gantt tells you how he acted; Newt tells you how he jumped. Rogers and Black, honest men when they went out there after Mr. Starnes had talked to him, tell you that he was nervous. Why? Why do you say you were nervous; because of the automobile ride? Because you looked into the face of this little girl and it was such a gruesome sight? I tell you, gentlemen of the jury, and you know it, that this man Frank needed, when he had his wife go down to the door, somebody to sustain him. I tell you that this man Frank, when he had his wife telephone Darley to meet him at the factory, did it because he wanted somebody to sustain him. I tell you, gentlemen of the jury, that, because he sent for Mr. Rosser,—big of reputation and big of brain, dominating and controlling, so far as he can, everybody with whom he comes in contact, the reason he wanted him at the Police Headquarters, and the reason he wanted Haas, was because his conscience needed somebody to sustain him.

And this man Darley! We had to go into the enemy's camp to get the ammunition, but fortunately, I got on the job and sent the subpoena, and fortunately Darley didn't know that he didn't have to come, and fortunately he came and made the affidavit, to which he stood up here as far as he had to because he couldn't get around it, in which Darley says "I noticed his nervousness; I noticed it upstairs, I noticed it downstairs," when they went to nail up the door. "When he sat in my lap going down to the Police Headquarters he shook and he trembled like an aspen leaf." I confronted him with the statement, in which he had said "completely undone." He denied it but said "almost undone." I confronted him with the statement that he had made, and the affidavit to which he had sworn, in which he had used

the language, "Completely unstrung," and now he changed it in your presence and said "almost completely unstrung."

You tell me that this man that called for breakfast at home, as Durant called for bromo seltzer in San Francisco, this man who called for coffee at the factory, as Durant called for bromo seltzer in San Francisco, you tell me that this man Frank, the defendant in this case, explains his nervousness by reason of the automobile ride, the view of the body,—as this man Durant, in San Francisco tried to explain his condition by the inhalation of gas,—you tell me, gentlemen of the jury, that these explanations are going to wipe out the nervousness that you know could have been produced by but one cause, and that is, the consciousness of an infamous crime that had been committed?

Old Newt Lee says that when he went back there that afternoon he found that inside door locked,—a thing that never had been found before he got there at four o'clock, a thing that he never had found. Old Newt Lee says that Frank came out of his office and met him out there by the desk, the place where he always went and said "All right, Mr. Frank," and that Frank had always called him in and given him his instructions. But Newt Lee says that night, when he went into the cellar, he found the light, that had always burned brightly turned back so that it was burning just about like a lightning bug. You tell me that old Jim Conley felt the necessity to have turned that light down? I tell you that that light was turned down, gentlemen, by that man, Leo M. Frank, after he went down there Saturday afternoon, when he discovered that Conley wasn't coming back to burn the body, to place the notes by the body, that Conley had written, and he turned it down in the hope that the body wouldn't be discovered by Newt Lee during that night.

Monday evening, Harry Scott is sent for, the Pinkerton man—and it didn't require any affidavit to hold old Scott down to the truth, though after my experience with that man Darley, I almost trembled in my boots for fear this

man Scott, one of the most material witnesses, although the detective of this defendant's company, might also throw me down. Scott says this man Frank, when he went there Monday afternoon, after he had anxiously phoned Schiff to see old man Sig Montag and get Sig Montag's permission—had phoned him three times—Scott says that he squirmed in his chair continually, crossed and uncrossed his legs, rubbed his face with his hand, sighed, twisted and drew long deep breaths. After going to the station Tuesday morning, just before his arrest—if he ever was arrested—just before his detention, at another time altogether from the time that Darley speaks of,—Darley, the man for whom he sent, Darley the man who is next to him in power, Darley the man that he wanted to sustain his nerve—Scott, your own detective, says that he was nervous and pale, and that when he saw him at the factory, his eyes were large and glaring. Tuesday morning, Waggoner, sent up there to watch him from across the street, says before the officers came to get him, he could see Frank pacing his office inside, through the windows, and that he came to the office window and looked out at him twelve times in thirty minutes,—that he was agitated and nervous on the way down to the station.

I want to read you here an excerpt from the speech of a man by the name of Hammond, when prosecuting a fellow by the name of Dunbar for the murder of two little children, it explains in language better than I can command, why all this nervousness:

"It was because the mighty secret of the fact was in his heart; it was the overwhelming consciousness of guilt striving within him; it was nature over-burdened with a terrible load; it was a conscience striving beneath a tremendous crushing weight; it was fear, remorse and terror—remorse for the past, and terror for the future. Spectral shadows were flitting before him"—the specter of the dead girl, the cord, the blood, arose. "The specter of this trial, of the prison, of the gallows and the grave of infamy. Guilt, gentlemen of the jury, forces itself into speech and conduct, and is its own betrayer."

Mr. Rosser said that once a thief, always a thief and eternally damned. Holy Writ, in giving the picture of the

death of Christ on the Cross, says that, when He suffered that agony, He said to the thief, "This day shalt thou be with Me in Paradise;" and unless our religion is a fraud and a farce, if it teaches anything, it is that man, though he may be a thief, may be rehabilitated, and enjoy a good character and the confidence of the people among whom he lives.

And this man Dalton, according to the unimpeached testimony of these people who have known him in DeKalb and Fulton since he left that crowd back yonder where he was a boy and probably wild and did things that were wrong, they tell you that today he is a man of integrity, notwithstanding the fact that he is sometimes tempted to step aside with a woman who has fallen so low as Daisy Hopkins. Did we sustain him? By more witnesses by far than you brought here to impeach him, and by witnesses of this community, witnesses that you couldn't impeach to save your life.

Did we sustain him? We not only sustained him by proof of general good character, but we sustained him by the evidence of this man, C. T. Maynard, an unimpeached and unimpeachable witness, who tells you, not when Newt Lee was there, during the three weeks that Newt Lee was there, but that on a Saturday afternoon in June or July, 1912, he saw with his own eyes this man Dalton go into that pencil factory with a woman. Corroboration of Conley? Of course, it's corroboration. The very fact, gentlemen of the jury, that these gentlemen conducting this case failed absolutely and ingloriously even to attempt to sustain this woman, Daisy Hopkins, is another corroboration of Conley.

But, ah! Mr. Rosser said he would give so much to know who it was that dressed this man Conley up,—this man about whom he fusses, having been put in the custody of the police force of the City of Atlanta. Why, if you had wanted to have known, and if you had used one-half the effort to ascertain that fact that you used when you sent somebody down yonder,—I forget the name of the man,—to Walton County

to impeach this man, Dalton, you could have found it out. And I submit that the man that did it, whoever he was, the man who had the charity in his heart to dress that negro up, —the negro that you would dress in a shroud and send to his grave,—the man that did that, to bring him into the presence of this Court deserves not the condemnation, but the thanks of this jury.

Let's see what Mr. William Smith, a man employed to defend this negro Conley, set up in response to the rule issued by His Honor, Juge Roan, and let's see now if they are not all sufficient reasons why Conley should not have been delivered into the custody of the city police of Atlanta, though they are no better, but just as good as the sheriff of this county. "Respondent (Jim Conley, through his attorney) admits that he is now held in custody, under orders of this Court, at the police prison of the City of Atlanta, having been originally held in the prison of Fulton County, also under order of this Court, the cause of said commitment by this Court of respondent being the allegation that respondent is a material witness in the above case,—that of The State against Leo M. Frank—in behalf of The State, and it is desired to insure the presence of respondent at the trial of the above case." So he couldn't get away, in order to hold him. "Respondent admits that he is now at the city police prison at his own request and instance, and through the advice and counsel of his attorney. Respondent shows to the Court that the city police prison is so arranged and so officered that respondent is absolutely safe as to his physical welfare from any attack that might be made upon him; that he is so confined that his cell is a solitary one, there being no one else even located in the cell block with him; that the key to his cell block and the cell of respondent is always in the possession of a sworn, uniformed officer of the law; that under the instruction of Chief of Police Beavers, said sworn officers are not allowed to permit any one to approach."

Judge Roan did it,—no reflection on the sheriff, but with the friends of this man Frank pouring in there at all hours

of the night, offering him sandwiches and whiskey and threatening his life, things that this sheriff, who is as good as the chief of police but no better, couldn't guard against because of the physical structure of the jail, Jim Conley asked, and His Honor granted the request, that he be remanded back into the custody of the honorable men who manage the police department of the City of Atlanta.

Mr. Rosser. No, that's a mistake, that isn't correct, Your Honor discharged him from custody—he said that under that petition Your Honor sent him back to the custody where you had him before, and that isn't true, Your Honor discharged him, vacated the order, that's what you did.

Mr. Dorsey. Here's an order committing him down there first—you are right about that, I'm glad you are right one time.

Mr. Rosser. That's more than you have ever been.

Mr. Dorsey. No matter what the outcome of the order may have been, the effect of the order passed by His Honor, Judge Roan, who presides in this case, was to remand him into the custody of the police of the City of Atlanta.

Mr. Rosser. I dispute that; that isn't the effect of the order passed by His Honor, the effect of the order passed by His Honor was to turn him out, and they went through the farce of turning him out on the street and carrying him right back. That isn't the effect of Your Honor's judgment. In this sort of case, we ought to have the exact truth.

The COURT. This is what I concede to be the effect of that ruling: I passed this order upon the motion of State's counsel, first, is my recollection, and by consent of Conley's attorney—

Mr. Rosser. I'm asking only for the effect of the last one.

The COURT. On motion of State's counsel, consented to by Conley's attorney, I passed the first order, that's my recollection. Afterwards, it came up on motion of the Solicitor General, I vacated both orders, committing him to the jail and also the order, don't you understand, transferring him; that left it as though I had never made an order, that's the effect of it.

Mr. Rosser. Then the effect was that there was no order out at all?

The COURT. No order putting him anywhere.

Mr. Rosser. Which had the effect of putting him out?

The COURT. Yes, that's the effect, that there was no order at all.

Mr. Dorsey. First, there was an order committing him to the common jail of Fulton County; second, he was turned over to the custody of the police of the City of Atlanta, by an order of Judge L. S. Roan; third, he was released from anybody's custody, and except for the determination of the

police force of the City of Atlanta, he would have been a liberated man, when he stepped into this Court to swear, or he would have been spirited out of the State of Georgia so his damaging evidence couldn't have been adduced against this man.

But yet you say Conley is impeached? You went thoroughly into this man Conley's previous life. You found out every person for whom he had worked, and yet this lousy, disreputable negro is unimpeached by any man except somebody that's got a hand in the till of the National Pencil Company, unimpeached as to general bad character, except by the hirelings of the National Pencil Company. And yet you would have this jury, in order to turn this man loose, over-ride the facts of this case and say that Conley committed this murder, when all you have ever been able to dig up against him is disorderly conduct in the Police Court. Is Conley sustained? Abundantly. Our proof of general bad character, the existence of such character as can reasonably be supposed to cause one to commit an act like we charge, our proof of general bad character, I say, sustains Jim Conley. Our proof of general bad character as to lasciviousness not even denied by a single witness, sustains Jim Conley. Your failure to cross-examine and develop the source of information of these girls put upon the stand by the State,—these "hair-brained fanatics," as Mr. Arnold called them, without rhyme or reason, sustains Jim Conley. Your failure to cross-examine our character witnesses with reference to this man's character for lasciviousness sustains Jim Conley. His relations with Miss Rebecca Carson, the lady on the fourth floor, going into the ladies' dressing room even in broad daylight and during working hours, as sustained by Miss Kitchens.

His relations with Miss Rebecca Carson, who is shown to have gone into the ladies' dressing room, even in broad daylight and during work hours, by witnesses whose names I can't call right now, sustains Jim Conley. Your own witness, Miss Jackson, who says that this libertine and rake

came, when these girls were in there reclining and lounging after they had finished their piece work, and tells of the sardonic grin that lit his countenance, sustains Jim Conley. Miss Kitchens, the lady from the fourth floor, that, in spite of the repeated assertion made by Mr. Arnold, you didn't produce, and her account of this man's conduct when he came in there on these girls, whom he should have protected and when he should have been the last man to go in that room, sustains Jim Conley; and Miss Jackson's assertion that she heard of three or four other instances and that complaint was made to the foreladies in charge, sustains Jim Conley. Darley and Mattie Smith, as to what they did even on the morning of Saturday, April 26th, even going into the minutest details, sustain Jim Conley. McCrary, the old negro that you praised so highly, the man that keeps his till filled by money paid by the National Pencil Company, as to where he put his stack of hay and the time of day he drew his pay, sustains Jim Conley. Monteen Stover, as to the easy-walking shoes she wore when she went up into this man's Frank's room, at the very minute he was back there in the metal department with this poor little unfortunate girl, sustains Jim Conley. Monteen Stover, when she tells you that she found nobody in that office, sustains Jim Conley, when he says that he heard little Mary Phagan go into the office, heard the footsteps of the two as they went to the rear, he heard the scream and he saw the dead body because Monteen says there was nobody in the office, and Jim says she went up immediately after Mary had gone to the rear. Lemmie Quinn, your own dear Lemmie,—as to the time he went up and went down into the streets with the evidence of Mrs. Freeman and Hall, sustains Jim Conley. Frank's statement that he would consult his attorneys about Quinn's statement that he had visited him in his office sustains Jim Conley. Dalton, sustained as to his life for the last ten years, here in this community and in DeKalb, when he stated that he had seen Jim watching before on Saturdays and holidays, sustains

Jim Conley. Daisy Hopkins' awful reputation and the statement of Jim, that he had seen her go into that factory with Dalton, and down that scuttle hole to the place where that cot is shown to have been, sustains Jim Conley. The blood on the second floor, testified to by numerous witnesses, sustains Jim Conley. The appearance of the blood, the physical conditions of the floor when the blood was found Monday morning, sustains Jim Conley. The testimony of Holloway, which he gave in the affidavit before he appreciated the importance, coupled with the statement of Boots Rogers that that elevator box was unlocked, sustains Jim Conley. Ivey Jones, the man who says he met him in close proximity to the pencil factory on the day this murder was committed, the time he says he left that place, sustains Jim Conley. Albert McKnight, who testified as to the length of time that this man Frank remained at home, and the fact that he hurried back to the factory, sustains Jim Conley. The repudiated affidavit, made to the police, in the presence of Craven and Pickett, of Minola McKnight, the affidavit which George Gordon, the lawyer, with the knowledge that he could get a habeas corpus and take her within thirty minutes out of the custody of the police, but which he sat there and allowed her to make, sustains Jim Conley. The use of that cord, found in abundance, to choke this girl to death, sustains Jim Conley. The existence of the notes alone sustains Jim Conley, because no negro ever in the history of the race, after having perpetrated rape or robbery, ever wrote a note to cover up the crime. The note paper on which it is written, paper found in abundance on the office floor and near the office of this man Frank, sustains Jim Conley. The diction of the notes, "this negro did this," and old Jim throughout his statement says "I done," sustains Jim Conley.

Mr. Rosser. I have looked the record up, and Jim Conley says, "I did it," time and time again. He said "I disremember whether I did or didn't," he says "I did it"—

Mr. Dorsey. They would have to prove that record before I would believe it.

Mr. Rosser. He says time and time again "I disremember whether I did or not"; he says "I did it," page after page, sometimes three times on a page. I've got the record, too. Of course, if the Almighty God was to say it you would deny it.

Mr. Dorsey. Who reported it?

Mr. Rosser. Pages 496, (Mr. Rosser here read a list of page numbers containing the statement referred to.)

Mr. Arnold. I want to read the first one before he caught himself, on page 946, I want to read the statement—

Mr. Dorsey. Who reported it, that's what I want to know.

Mr. Arnold. This is the official report and it's the correct report, taken down by the official stenographer, and he said, "Now when the lady comes I'll stamp like I did before," "I says all right, I'll do just as you say and I did."

Mr. Dorsey. He's quoting Frank here, "and he says now when the lady comes I'll stamp like I did."

Mr. Arnold. "I says all right, I'll do just as you say, and I did as he said." He has got it both ways, "I did it," and "I done it," you can find it both ways.

Mr. Dorsey. The jury heard that examination and the cross-examination of Jim Conley, and every time it was put to him he says "I done it."

Mr. Rosser. And I assert that's not true, the stenographer took it down and he took it down correctly.

Mr. Dorsey. I'm not bound by his stenographer.

Mr. Rosser. I know, you are not bound by any rule of right in the universe.

The COURT. If there's any dispute about the correctness of this report, I will have the stenographer to come here.

Mr. Parry. I reported 1 to 31 myself, and I think I can make a statement that will satisfy Mr. Dorsey: The shorthand character for "did" is very different from "done," there's no reason for a reporter confusing those two. Now, at the bottom of this page—I see I reported it myself, and that was what he said, quoting "All right, I'll do just as you say and I did as he said." Now, as I say, my characters for "did" and "done" are very different and shouldn't be confused—no reason for their being confused.

The COURT. Well, is that reported or not correctly?

Mr. Parry. That was taken as he said it and written out as he said it.

Mr. Dorsey. Let it go, then, I'll trust the jury on it.

Maybe he did, in certain instances, say that he did so and so, but you said in your argument that if there is anything in the world a negro will do, it is to pick up the language of the man for whom he works; and while I'll assert that there are some instances you can pick out in which he used that

word, that there are other instances you might pick showing that he used that word "I done," and they know it. All right, leave the language, take the context.

These notes say, as I suggested the other day, that she was assaulted as she went to make water. And the only closet known to Mary, and the only one that she would ever have used is the closet on the office floor, where Conley says he found the body, and her body was found right on the route that Frank would pursue from his office to that closet, right on back also to the metal room. The fact that this note states that a negro did it by himself, shows a conscious effort on the part of somebody to exclude and limit the crime to one man, and this fact sustains Conley. Frank even, in his statement sustains him, as to his time of arrival Saturday morning at the factory, as to the time of the visit to Montags, as to the folder which Conley says Frank had in his hands, and Frank in his statement says that he had the folder. Conley is sustained by another thing: This man Harry White, according to your statement got $2.00. Where is the paper, where is the entry on any book showing that Frank ever entered it up on that Saturday afternoon when he waited for Conley and his mind was occupied with the consideration of the problem as to what he should do with the body. Schiff waited until the next week and would have you believe there was some little slip that was put in a cash box showing that this $2.00 was given White, and that slip was destroyed. Listen to this: "Arthur White borrowed $2.00 from me in advance on his wages. When we spend, of course, we credit it; there was a time, when we paid out money we would write it down on the book and we found it was much better for us to keep a little voucher book and let each and every person sign for money they got."

"Let each and every person sign for money they got," says Frank in his statement, "and we have not only this record, but this record on the receipt book." And notwithstanding that you kept a book and you found it better to keep this little voucher book and let each and every person

sign for money they got, notwithstanding the fact that you say that you kept a book for express and kerosene and every other conceivable purpose for which money was appropriated, you fail and refuse, because you can't, produce the signature of White, or the entry in any book made by Frank showing that this man White ever got that money, except the entry made by this man Schiff some time during the week thereafter.

I tell you, gentlemen of the jury, that the reason that Frank didn't enter up, or didn't take the receipt from White about the payment of that money, was because his mind and conscience were on the crime that he had committed. This expert in bookkeeping, this Cornell graduate, this man who checks and re-checks the cash, you tell me that if things were normal that he would have given out to that man White this $2.00 and not have taken a receipt, or not have made an entry himself on some book, going to show it? I tell you there's only one reason why he didn't do it. He is sustained by the evidence in this case and the statement of Frank that he had relatives in Brooklyn. The time that Frank says that he left that factory sustains old Jim.

When old Jim Conley was on the stand, Mr. Rosser put him through a good deal of questioning with reference to some fellow by the name of Mincey. Where is Mincey? Echo answers "Where?" Either Mincey was a myth, or Mincey was such a diabolical perjurer that this man knew that it would nauseate the stomach of a decent jury to have him produced. Where is Mincey? And if you weren't going to produce Mincey, why did you parade it here before this jury? The absence of Mincey is a powerful fact that goes to sustain Jim Conley, because if Mincey could have contradicted Jim Conley, or could have successfully fastened an admission on old Jim that he was connected in any way with this crime, depend upon it, you would have produced him if you had to comb the State of Georgia with a fine-tooth comb, from Rabun Gap to Tybee Light.

Gentlemen, every act of that defendant proclaims him

guilty. Gentlemen, every word of that defendant proclaims him responsible for the death of this little factory girl. Gentlemen, every circumstances in this case proves him guilty of this crime. Extraordinary? Yes, but nevertheless true, just as true as Mary Phagan is dead. She died a noble death, not a blot on her name. She died because she wouldn't yield her virtue to the demands of her superintendent. I have no purpose and have never had from the beginning in this case that you oughtn't to have, as an honest, upright citizen of this community. In the language of Daniel Webster, I desire to remind you "that when a jury, through whimsical and unfounded scruples, suffers the guilty to escape, they make themselves answerable for the augmented danger to the innocent."

Your Honor, I have done my duty. I have no apology to make. Your Honor, so far as the State is concerned, may now charge this jury,—this jury who have sworn that they were impartial and unbiased, this jury who, in this presence, have taken the oath that they would well and truly try the issue formed on this bill of indictment between the State of Georgia and Leo M. Frank, charged with the murder of Mary Phagan; and I predict, may it please Your Honor, that under the law that you give in charge and under the honest opinion of the jury of the evidence produced, there can be but one verdict, and that is: We the jury find the defendant, Leo M. Frank, guilty! guilty! guilty!

August 25.

Mr. Arnold asked that the jury be ordered to retire as he had an application to make which he did not desire it should hear.

The COURT acquiesced and the jury retired.

Mr. Arnold. I make a motion for a mistrial, and I wish to name the facts on which we make it. We wish to prove every fact included in this motion, unless the court already knows it. We base our motion on the following facts:

First, at the beginning of this trial counsel for the defendant requested that the court room be cleared.

Second, when the court refused to rule out evidence relating to women, the audience applauded loudly. The jury was in the court room twenty feet away and heard the applause.

Third, on Friday, August 22, when court had just adjourned for the day, when the jury was 200 feet north of the courthouse on

South Pryor street, a large crowd cheered the solicitor, crying, "Hurrah for Dorsey."

Fourth, on Saturday, August 23, 1913, when the jury was only 100 feet away from the courthouse, in the German cafe, a crowd in front of the courthouse loudly cheered the solicitor as he came out, and afterward a portion of the crowd moved up in front of the cafe and repeated their cheers.

Fifth, that on the last day of the trial, namely Monday, a large crowd of women had assembled in the courtroom and taken their seats before court opened; that as Mr. Dorsey entered the courthouse he was loudly cheered; and that the jury in rooms not more than twenty feet away must have heard the demonstration plainly.

Sixth, that these demonstrations tended to coerce and intimidate the jury and influence their verdict in the case.

Your Honor, in the event you do not take cognizance of these facts yourself and certify to them, we stand ready to prove them all. The behavior of the spectators throughout this trial has been disgraceful. This man has had anything in the world but a fair trial. I am not afraid of this crowd, and I hope no one else is, but their demonstrations tend to intimidate the jury.

Mr. Dorsey. We deny there were any shouts of "Hurrah for Dorsey!" And we contend that it is ridiculous to claim they amounted to anything even if they were. You have the right to charge the jury that if they heard any of these cheers, to pay no attention to them, just as you charged the jury to pay no attention to that newspaper headline which you inadvertently allowed them to see.

JUDGE ROAN. Of course I heard the cheers this morning, and the cheers Saturday afternoon. But I do not know what was said.

Mr. Arnold. Do you deny, Mr. Solicitor, that there were cheers of "Hurrah for Dorsey?"

Mr. Dorsey. I heard the noise, but I heard no such cheers as that.

Mr. Arnold. We want an opportunity, your Honor, to prove these facts unless you are willing to certify to them yourself.

JUDGE ROAN. Whether the jury was influenced this morning, I don't know. What was said Saturday, I don't know. As to the jury being in the German cafe Saturday afternoon, and as to a portion of the crowd moving up in front of the cafe, and continuing the demonstration, I don't know.

Mr. Arnold. Then we have to prove our facts. Where are these men that had charge of the jury? I understand the solicitor demurs to this action.

JUDGE ROAN. No, I don't understand that he demurs.

Mr. Dorsey. Your Honor I deny and demur, too.

R. V. Davers. Am a deputy sheriff; was not in charge of the jury on Friday, but was one of the men in charge on Saturday; the jury was near the German cafe when the applause began and I heard the applause; did not hear cries of "Hurrah for Dorsey;" the jury could have heard the applause and cheers;

after they went inside the cafe did not hear any more cheers or applause.

Cross-examined. The crowd was in front of the courthouse; I could not hear the words they said, but only the noises and the handclaps; no one came inside of the cafe after the jury entered; heard nothing on the outside after they went in; do not know whether Solicitor Dorsey was in the courthouse or outside of the courthouse when cheering commenced.

Mr. Arnold. As Mr. Dorsey left the courtroom Friday afternoon I heard loud cheering in front of the courthouse; on Saturday I asked the Solicitor not to leave the courtroom until the jury had gotten out of hearing, to which the Solicitor readily agreed; after we had waited several minutes, we thought the jury was out of hearing, and the Solicitor left the courtroom with me; as the Solicitor stepped into the street there were loud and excited cheers and cries of "Hurrah for Dorsey;" in my judgment these cries could have been heard as far as Alabama street.

To *Mr Hooper.* Do not know where the jury was at the time, except by information; did not hear this trial mentioned by the crowd; did not hear the crowd mention Frank's name. At any other time, I would be glad for my friend Dorsey to get all the approbation he can. But on this occasion I think the conduct of the crowd was shameful. In my judgment, if the jury is composed of men of ordinary hearing, they could have heard what I heard.

Charles F. Huber. Am one of the deputies who was in charge of the jury on Friday; did not know of the cheers on Friday until Saturday morning. (Laughter.)

Mr. Arnold. Why, your Honor! you can't even keep them quiet now, here in the courtroom. I wish to state in the record, Mr. Stenographer, that while a witness was being examined in support of the motion, quite a demonstration took place in the courtroom unfavorable to the defendant. Will your Honor certify to that?

JUDGE ROAN. I will certify to what happened.

Mr. Arnold. Will you decline to certify, your Honor, that I asked you before this trial commenced to clear the courtroom?

JUDGE ROAN. No, I won't decline to do that.

Mr. Arnold. We want an opportunity, your Honor, to complete our showing on this motion; some of the other deputies are not here.

JUDGE ROAN. I will overrule the motion for a mistrial, charge the jury, and then give the attorneys for the defense an opportunity to summon other witnesses and complete what showing they desire to make on the motion.

The jury were recalled, and entered the courtroom.

THE CHARGE TO THE JURY.

JUDGE ROAN: Gentlemen of the jury. This bill of indictment charges Leo M. Frank with the offense of murder. The charge is that Leo M. Frank, in this county, on the 26th

day of April of this year, with force and arms, did unlawfully and with malice aforethought kill and murder one Mary Phagan by then and there choking her, the said Mary Phagan, with a cord placed around her neck.

To this charge made by the bill of indictment found by the Grand Jury of this county recently empaneled Leo M. Frank, the defendant, files a plea of not guilty. The charge as made by the bill of indictment on the one hand and his plea of not guilty filed thereto form the issue, and you, gentlemen of the jury, have been selected, chosen and sworn to try the truth of this issue.

Leo M. Frank, the defendant, commences the trial of this issue with the presumption of innocence in his favor, and this presumption of innocence remains with him to shield him and protect him until the state shall overcome it and remove it by evidence offered to you, in your hearing and presence, sufficient in its strength and character to satisfy your minds beyond a reasonable doubt of his guilt of each and every material allegation made by the bill of indictment.

I charge you, gentlemen, that all of the allegations of this indictment are material and it is necessary for the state to satisfy you of their truth by evidence that convinces your minds beyond a reasonable doubt of his guilt before you would be authorized to find a verdict of guilty.

You are not compelled to find, from the evidence, his guilt beyond any doubt, but beyond a reasonable doubt, such a doubt as grows out of the evidence in the case, or for the want of evidence, such a doubt as a reasonable and impartial man would entertain about matters of the highest importance to himself after all reasonable efforts to ascertain the truth. This does not mean a fanciful doubt, one conjured up by the jury, but a reasonable doubt.

Gentlemen, this defendant is charged with murder. Murder is defined to be the unlawful killing of a human being, in the peace of the state, by a person of sound memory and discretion, with malice aforethought either express or implied.

Express malice is that deliberate intention unlawfully to take away the life of a fellow-creature, which is manifested by external circumstances capable of proof.

Malice shall be implied where no considerable provocation appears, and where all of the circumstances of the killing show an abandoned and malignant heart.

There is no difference between express and implied malice except in the mode of arriving at the fact of its existence. The legal sense of the term "malice" is not confined to particular animosity to the deceased, but extends to an evil design in general. The popular idea of malice in its sense of revenge, hatred, ill will, has nothing to do with the subject. It is an intent to kill a human being in a case where the law would neither justify nor in any degree excuse the intention if the killing should take place as intended. It is a deliberate intent unlawfully to take human life, whether it springs from hatred, ill will or revenge, ambition, avarice or other like passion. A man may form the intent to kill, do the killing instantly, and regret the deed as soon as done. Malice must exist at the time of the killing. It need not have existed any length of time previously.

When a homicide is proven, if it is proven to be the act of the defendant, the law presumes malice, and unless the evidence should relieve the slayer he may be found guilty of murder. The presumption of innocence is removed by proof of the killing by the defendant. When the killing is shown to be the act of the defendant, it is then on the defendant to justify or mitigate the homicide. The proof to do that may come from either side, either from the evidence offered by the state to make out its case, or from the evidence offered by the defendant or the defendant's statement.

Gentlemen of the jury, you are made by law the sole judges of the credibility of the witnesses and the weight of the testimony of each and every witness. It is for you to take this testimony as you have heard it, in connection with the defendant's statement, and arrive at what you believe to be the truth.

Gentlemen, the object of all legal investigation is the discovery of truth. That is the reason of you being selected, empaneled and sworn in this case—to discover what is the truth on this issue formed on this bill of indictment. Is Leo M. Frank guilty? Are you satisfied of that beyond a reasonable doubt from the evidence in this case? Or is his plea of not guilty the truth?

The rules of evidence are framed with a view to this prominent end—seeking always for pure sources, and the highest evidence.

Direct evidence is that which immediately points to the question at issue. Indirect or circumstantial evidence is that which only tends to establish the issue by proof of various facts sustaining, by their consistency, the hypothesis claimed. To warrant a conviction on circumstantial evidence, the proven facts must not only be consistent with the hypothesis of guilt, but must exclude every other reasonable doubt hypothesis save that of the guilt of the accused.

The defendant has introduced testimony as to his good character. On this subject, I charge you that evidence of good character when offered by the defendant in a criminal case is always relevant and material, and should be considered by the jury, along with all the other evidence introduced, as one of the facts of the case.

It should be considered by the jury, not merely where the balance of the testimony in the case makes it doubtful whether the defendant is guilty or not, but also where such evidence of good character may of itself generate a doubt as to the defendant's guilt. Good character is a substantial fact, like any other fact tending to establish the defendant's innocence, and ought to be so regarded by the jury. Like all other facts proved in the case, it should be weighed and estimated by the jury, for it may render that doubtful which otherwise would be clear.

However, if the guilt of the accused is plainly proved to the satisfaction of the jury beyond a reasonable doubt, notwithstanding the proof of good character, it is their duty to

convict. But the jury may consider the good character of the defendant, whether the rest of the testimony leaves the question of his guilt doubtful or not, and if a consideration of the proof of his good character, considered along with the evidence, creates a reasonable doubt in the minds of the jury as to the defendant's guilt, then it would be the duty of the jury to give the defendant the benefit of the doubt thus raised by his good character, and to acquit him.

The "character" as used in this connection, means that general reputation which he bore among the people who knew him prior to the time of the death of Mary Phagan. Therefore, when the witnesses by which a defendant seeks to prove his good character are put upon the stand, and testify that his character is good, the effect of the testimony is to say that the people who knew him spoke well of him, and that his general reputation was otherwise good. When a defendant has put his character in issue, the state is allowed to attack it by proving that his general reputation is not good, or by showing that the witnesses who have stated that his character is good, have untruly reported it.

Hence, the Solicitor General has been allowed to cross-examine the witnesses for the defense who were introduced to testify to his good character. In the cross-examination of these witnesses, he was allowed to ask them if they had not heard of various acts of misconduct on the defendant's part. The Solicitor General had the right to ask any question along this line he pleased, in order thoroughly to sift the witnesses, and to see if anything derogatory to the defendant's reputation could be proved by them.

The Court now wishes to say to you that, although the Solicitor General was allowed to ask the defendant's character witnesses these questions as to their having heard of various acts of alleged misconduct on the defendant's part the jury is not to consider this as evidence that the defendant has been guilty of any such misconduct as may have been indicated in the questions of the Solicitor General, or any of them, unless the alleged witnesses testify to it. Furthermore,

where a man's character is put in evidence, and in the course of the investigation any specific act of misconduct is shown, this does not go before the jury for the purpose of showing affirmatively that his character is bad or that he is guilty of the offense with which he stands charged, but is to be considered by the jury only in determining the credibility and the degree of information possessed by those witnesses who have testified to his good character.

When the defendant has put his character in issue, the state is allowed to bring witnesses to prove that his general character is bad, and thereby to disprove the testimony of those who have stated that it is good. The jury is allowed to take this testimony, and have the right to consider it along with all the other evidence introduced on the subject of the general character of the defendant, and it is for the jury finally to determine from all the evidence whether his character was good or bad. But a defendant is not to be convicted of the crime with which he stands charged, even though, upon a consideration of all the evidence, as to his character the jury believes that his character is bad unless from all the other testimony in the case they believe that he is guilty beyond a reasonable doubt.

You will, therefore, observe that this is the rule you will be guided by in determining the effect to be given to the evidence on the subject of the defendant's character. If, after considering all the evidence pro and con on the subject of the defendant's character, you believe that prior to the time of Mary Phagan's death he bore a good reputation among those who knew him, that his general character was good, you will consider that as one of the facts in the case, and it may be sufficient to create a reasonable doubt of the defendant's guilt, if it so impress your minds and consciences, after considering it along with all the other evidence in the case; and if it does you should give the defendant the benefit of the doubt and acquit him. However, though you should believe his general character was good, still if, after giving due weight to it as one of the facts in the case, you believe from

the evidence as a whole that he is guilty beyond a reasonable doubt, you would be authorized to convict him.

If you believe beyond a reasonable doubt from the evidence in this case that this defendant is guilty of murder, then you would be authorized in that event to say, "We, the jury, find the defendant guilty." Should you go no further, gentlemen, and say nothing else in your verdict, the Court would have to sentence the defendant to the extreme penalty for murder, towit: to be hanged by the neck until he is dead. But should you see fit to do so, in the event you arrive at the conclusion and belief beyond a reasonable doubt from the evidence that this defendant is guilty, then, gentlemen, you would be authorized in that event, if you saw fit to do so, to say: "We, the jury, find the defendant guilty, and we recommend that he be imprisoned in the pentitentiary for life." In the event you should make such a verdict as that, then the Court, under the law, would have to sentence the defendant to the penitentiary for life.

You have heard the defendant make his statement. He had the right to make it under the law. It is not made under oath and he is not subject to examination or cross-examination. It is with you as to how much of it you will believe or how little of it. You may go to the extent, if you see fit, of believing it in preference to the sworn testimony in the case.

In the event, gentlemen, you have a reasonable doubt from the evidence, or the evidence and the statement together, or either, as to the defendant's guilt as charged, then give the prisoner the benefit of that doubt and acquit him; and in the event you do acquit him the form of your verdict would be: "We, the jury, find the defendant not guilty." As honest jurors do your utmost to reach the truth from the evidence and statement as you have heard it here, then let your verdict speak it.

At 12:45 the *Jury* retired.

THE VERDICT AND SENTENCE.

At 4:55 the *Jury* returned into court with a verdict of *guilty.*

The courtroom had been cleared of spectators; the prisoner himself, as well as his counsel, were absent (see *post,* p. 410) and only the Judge, the officers of the court and the state counsel and some other members of the bar were present.

When the verdict was rendered, the windows of the courtroom were closed on account of the noise made by the crowd in the streets.[a]

[a] "While the jury was out nearly four hours, and each and every member was pledged to secrecy, it is definitely known that only one ballot was taken and that the verdict was reached in a comparatively short time. When the crowd that filled the court room was driven out Monday afternoon on the order of Judge Roan, it flowed to the streets to await the verdict, increasing in size as the minutes passed.

"A veritable honeycomb of humanity spread over the section from Whitehall to Central avenue, on Hunter street, and from Alabama to Mitchell on Pryor. Men and women clung to the walls of buildings and sat in doorways. Windows were crowded with women and girls and children. It was as though a street audience had gathered to watch an eventful procession. The shrill orders of the mounted policemen arose over the hum of the crowd. A knot of men clustered around the press room, the windows of which front Hunter street, just opposite the new court house building. As the reporters at the telephone shouted the verdict to their offices, the word came through the windows. It was received with a shout. The cry of guilty took winged flight from lip to lip. It traveled like the rattle of musketry. Then came a combined shout that rose to the sky. Pandemonium reigned. Hats went into the air. Women wept and shouted by turns.

"A great ovation was accorded Solicitor General Dorsey. As he appeared in the doorway of the court house while the crowd yelled its reception of the Frank verdict, there came a mighty roar."—Atlanta Constitution, Aug. 26, 1913.

"The jury reached their verdict within two hours after Frank's life had been placed in their hands. On the first ballot the vote was ten for conviction, one blank and one doubtful. The second ballot was taken just one hour later, and resulted in a unanimous vote for conviction."—Atlanta Journal, Aug. 26, 1913.

"Two thousand people, mostly men, awaited the announcement of the verdict in the streets around the court house and the demonstration following the news of the verdict drew double that number to the scene. The windows of the court room were ordered closed, so great was the din from without the court. As the solicitor passed

JUDGE ROAN: Mr. Sheriff, I will pass sentence tomorrow. Have the prisoner here. I will notify you in time of the hour. Gentlemen of the jury, I thank you for your patient service in this case. This has been the longest trial I have ever participated in, and I dare say the longest you ever have or ever will. Thanking you again for your long and faithful service and arduous labors the Court will now dismiss you. The state will furnish your script for twenty-nine days.

August 26.

JUDGE ROAN: Mr. Frank, stand up. The jury which has been trying you for days or rather for weeks, on yesterday afternoon rendered a verdict finding you guilty of murder. It is now my duty as the presiding judge of this court to pass the sentence of the law upon you for that offense. Before I pass that sentence, have you anything to say, wherefore it should not be passed.

Frank: I say now, as I have always said, that I am innocent. Further than that my case is in the hands of my counsel.

JUDGE ROAN: Mr. Frank, I have tried to see that you had a fair trial for the offense for which you have been indicted. I have the consciousness of knowing that I have made every effort, as the law requires me to do, to see that your trial was fair. Your counsel has notified me that a motion for a new

from the court house door he was picked up bodily by members of the waiting crowd, and on their shoulders carried to his office in the Kiser building across Pryor street. The shouting was deafening when the solicitor appeared in the street. Two ballots were cast by the jury before an agreement was reached. The first ballot cast showed eleven members for a verdict of guilty without the recommendation of mercy and one in doubt. After one more ballot, an hour later, the twelfth man came over to the majority and made the early verdict possible. Judge Roan declared that never in all of his experience had he witnessed such a demonstration following the announcement of a verdict. The shout from the 2,000 gathered outside the court room attracted more, and in ten minutes after the verdict was made public the crowd was so great that the police reserves began riding through it in an effort to disperse it."—Atlanta Journal, Aug. 26, 1913.

trial will be filed in due order, and it will be duly heard. It is now my duty to pronounce the formal sentence of the law upon you, which I will read in open court. Indictment for murder, Fulton superior court, May term, 1913. Verdict of guilty, July term, 1913. Whereupon, it is considered, ordered and adjudged by the court that the defendant, Leo M. Frank, be taken from the bar of this court to the common jail of the county of Fulton, and that he be there safely kept until his final execution in the manner fixed by law. It is further ordered and adjudged by the court that on the tenth day of October, 1913, the defendant, Leo M. Frank, shall be executed by the sheriff of Fulton county in private, witnessed only by the executing officer, a sufficient guard, the relatives of such defendant, and such clergymen and friends as he may desire; such execution to take place in the common jail of Fulton county, and that said defendant on that day, between the hours of 10 o'clock a. m. and 2 o'clock p. m. be by the sheriff of Fulton county hanged by the neck until he shall be dead, and may God have mercy on his soul.

The following protest was issued by the prisoner's attorneys and published in the Atlanta newspapers of August 26:

We deem it not amiss to make a short statement, as the attorneys of Leo M. Frank, to the public. The trial which has just occurred and which has resulted in Mr. Frank's conviction, was a farce and not in any way a trial. In saying this, we do not make the least criticism of Judge Roan, who presided. Judge Roan is one of the best men in Georgia and is an able and conscientious judge. The temper of the public mind was such that it invaded the court room and invaded the streets and made itself manifest at every turn the jury made; and it was just as impossible for this jury to escape the effects of this public feeling as if they had been turned loose and had been permitted to mingle with the people. In doing this we are making no criticism of the jury. They were only men and unconsciously this prejudice rendered any other verdict impossible. It would have required a jury of stoics, a jury of Spartans to have withstood this situation. The time ought to come when this man will get a fair trial, and we profoundly believe that it will. The final judgment of the American people is a fair one. It is sometmes delayed in coming, but it comes. We entered into this case with the profound conviction of Mr. Frank's innocence. The result has not changed our opinion. Every step of the trial has intensified and fortified our profound conviction of his innocence.

L. Z. Rosser,
R. R. Arnold.

THE SUBSEQUENT HISTORY OF THE CASE—THE APPEALS TO THE COURTS—THE COMMUTATION BY THE GOVERNOR—THE LYNCHING OF THE PRISONER.

October 31, 1913, Judge Roan denied the motion for a new trial; February 17, 1914, the Supreme Court of Georgia affirmed the verdict of the lower court by a vote of four to two, and February 25, unanimously overruled a motion for rehearing.[1] March 7 Frank was sentenced for a second time, April 17 being set as the date for the execution. April 16 an extraordinary motion for a new trial was filed and sentence was again stayed. April 22, Judge B. H. Hill, former chief justice of the Court of Appeals,[1a] who had succeeded to the judgeship of Fulton Superior Court, denied the extraordinary motion for a new trial. April 25 Frank's sanity was examined and he was declared sane. November 14 the Georgia Supreme Court again denied a new trial[2] and on Novem-

[1] A large number of technical errors in procedure and in the admission of evidence and the prejudice of the jurymen were alleged by the prisoner's attorneys, but were all overruled by the Supreme Court. Frank v. State, 80 S. E. Rep. 1016. The Court also ruled that the disorder in the court room during the trial was not of such a character as to impugn its fairness or furnish ground for reversing the verdict; and that the cheering in the streets on the last day of the trial was not heard by the jury, and they had no knowledge of it until after they had rendered their verdict. The absence of the prisoner from the Court room when the verdict was given was not mentioned by his attorneys in this appeal. Frank v. State, 83 S. E. Rep. 33.

[1a] See *post*, p. 628.

[2] The error here alleged was the absence of the prisoner without his consent from the Court room when the verdict was rendered. Frank v. State, 83 S. E. Rep. 645. The Court stated the case in these words:

"At the time the verdict was received and the jury trying the case discharged, the defendant was in the custody of the law and incarcerated in the common jail of the county. He was not present when the verdict was received, and the jury discharged as he had the right in law to be, and as the law required he should be. He did not waive the right to be present, nor did he authorize anyone to waive it for him, nor consent that he should not be present. He did not know

ber 18, refused a writ of error. November 23, Mr. Justice Lamar, of the Supreme Court of the United States, refused a writ of error. November 25, Mr. Justice Holmes, of the United States Supreme Court, also refused a writ. December 7, the full bench of the United States Supreme Court refused a writ of error. December 9, Frank was re-sentenced

that the verdict had been rendered and the jury discharged until after the reception of the verdict and the discharge of the jury, and did not know of any waiver of his presence made by his counsel until after sentence of death had been pronounced upon him. On the day the verdict was rendered and before the judge who presided at the trial of the cause began his charge to the jury, the judge in the jury room of the court house wherein the trial was proceeding, privately conversed with two of the counsel of the defendant, and in the conversation referred to the probable danger of violence that the defendant would be in if he were present when the verdict was rendered, if the verdict should be one of acquittal; and after the judge had thus expressed himself he requested the counsel thus spoken to, to agree that the defendant need not be present at the time the verdict was rendered, and the jury was polled. In these circumstances the counsel did agree with the judge that the defendant should not be present at the rendition of the verdict. In the same conversation the judge expressed the opinion also to the counsel that even counsel of the defendant might be in danger if they should be present at the reception of the verdict. In these circumstances defendant's counsel, Rosser and Arnold, did agree with the judge that defendant should not be present at the rendition of the verdict. The defendant was not present at the conversation and knew nothing about any agreement made as above stated until after the verdict was received, and the jury was discharged and until after sentence of death was pronounced upon him. Pursuant to the conversation, neither of defendant's counsel were present when the verdict was received, and the jury discharged. Defendant says that he did not give counsel nor anyone else any authority to waive or renounce the right of the defendant to be present at the reception of the verdict or to agree that the defendant should not be present thereat; that the relation of client and attorney did not give them such authority, though counsel acted in the most perfect good faith and in the interest of the safety of the defendant. Defendant did not agree that his counsel or either of them might be absent when the verdict was rendered.

"Defendant says upon and because of the grounds above stated: The verdict was of no legal effect, and was void and in violation of article 1, Sec. 1, par. 3, of the Constitution of the State of Georgia, which provides that 'no person shall be deprived of life, liberty or property except by due process of law. That the recepton of the verdict in the involuntary absence of the defendant, was in violation of and contrary to the provisions of Article 6, Sec. 18, par. 1, of the

to hang January 22, 1915. December 21 United States District Judge, W. T. Newman of Georgia, refused a writ of *habeas corpus*. December 28, 1914, Mr. Justice Lamar granted an appeal and certificate of reasonable doubt to the United States Supreme Court. April 19, 1915, the Supreme Court of the United States, with Mr. Justices Holmes and Hughes dissenting, dismissed the appeal.[3] May 31, Frank's plea for commutation of sentence to life imprisonment was heard before the State Prison Commission. June 9, 1915, the State Prison Commission submitted a divided report to Governor Slaton, Commissioners Davison and Rainey voting against, and Commissioner Paterson for commutation. June 21, Governor Slaton commuted Frank's sentence to life imprisonment and the prisoner was taken to Milledgeville to begin his sentence.

On July 17, 1915, Frank was attacked by a fellow convict who cut his throat with a butcher knife. He lingered between life and death for several weeks, but finally recovered.

Constitution of the State of Georgia, which provides that the right of trial by jury except where it is otherwise provided in this Constitution, shall remain inviolate. That the reception of the verdict in the absence of the defendant was contrary to and in violation of the provisions of the fourteenth amendment to the Constitution of the United States, to wit: 'Nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' That the reception of the verdict in the absence of the defendant was in violation of Article 1, Sec. 1, par. 5, of the Constitution of the State of Georgia, to wit: 'Every person charged with an offense against the laws of this State shall have the privilege and benefit of counsel.'"

The Supreme Court ruled that because Frank was in court with his attorneys when he was sentenced and because later, within the time allowed by law, made a motion for a new trial, which recited, among other things his absence at the reception of the verdict, and that his presence had been waived by his counsel and his motion for new trial was refused by the trial court and its judgement affirmed by the Supreme Court, the defendant must be considered as having acquiesced in the waiver made by his counsel of his presence at the reception of the verdict, and he cannot at a subsequent date set up such absence as a ground to set aside the verdict.

[3] Frank v. Magnum, 237 U. S. 309.

At daybreak on August 17th, two miles northeast of Marietta, in Cobb County, Georgia, Frank was lynched by a mob. Mary Phagan's body was buried in the cemetery of this town. A number of men in automobiles arrived at the State Prison farm where Frank was serving his commuted life sentence, after dark on the evening of August 16th. These men cut the telephone wires, overpowered the guards, entered the hall where Frank was sleeping, carried him into one of the automobiles, and the journey was made during the night all the way to Marietta, Cobb County, a distance of some 125 miles. Frank was hanged to a tree by this mob. The mob was dissuaded from burning the body by some citizens who arrived on the scene after the hanging.[4]. The body

[4] Marietta, Georgia. The scenes at the place where Leo M. Frank was hanged, were nerve wrecking. The crowd gathered with rapidity. They swarmed the road from both directions. They seemed to rise up out of the ground, so fast they came. The automobiles came careening, recklessly disregarding life and limb of occupants. Horse-drawn vehicles came at a gallop. Pedestrians came running. Women came, children came—even babies in arms. The sight of the body swaying in the wind with the red gaping wound in the throat, made some of the women sick, and they would utter little shrieks and groans and turn their heads away. Other women walked up to the packed mass of men, pushed their way into the pack and looked on the dead body without the quiver of an eye-lash. One of the first arrivals was a man in a frenzy of passion. He was bareheaded, coatless, his eyes blazing like the eyes of a maniac. He ran through the crowd, ran up to the body, threw up his hands, clinched his fist and shook them at the body. Then his hands opened and his fingers writhed. His fists closed again, and he shook them at the body. "Now we've got you," he screamed. "You won't murder any more innocent little girls. We've got you now. They won't put any monument over you. They are not going to get you. They are not going to get a piece of you as big as a cigar." The crowd yelled, and packed closer. At this juncture, a short, thick-set man ran up to the crowd, jostled his way through and pushed up to a place beside the man who was cursing the body. He climbed up on something so that he could see over the heads of the crowd. "Men, hear me," he said. It was Newton A. Morris, former Judge of Blue Ridge district, who had just arrived from Marietta, with Attorney John Wood, of Canton. They were attending at court, heard the news early Tuesday morning, and came at top speed to the scene. "Hear me, men," said Judge Morris. The crowd became quiet except for a mumbling by the man beside the body. "Citizens of Cobb County, listen to me, will you?" said Judge Morris. They gave a murmur of assent.

was cut down and carried to Atlanta and from there sent to Brooklyn where his parents lived.

"Whoever did this thing—" The man beside the body broke in with a shout: "God bless him, whoever he was." Judge Morris laid his hand on the man's shoulder and asked him to be quiet for a few minutes. "Whoever did this thing did a thorough job." "They shore did," chorused the crowd. "Whoever did this thing," said Judge Morris, "left nothing more for us to do. Little Mary Phagan is vindicated. Her foul murder is avenged. Now, I ask you, I appeal to you as good citizens of Cobb County, in the good name of our county, not to do more. I appeal to you to let the undertaker take it." The man by the body broke in again, "We are not going to let the undertaker have it," he shrieked. "We are not going to let them erect a monument over that thing. We are not going to let them have a piece of it as big as a cigar. We are going to burn it, that's what we are going to do. We are going to burn it. Come on, boys, let's burn the dirty thing." "Men, I appeal to you," he shouted, "don't do anything to this body. Let the undertaker have it. This man has a father and mother, and whatever we think of him, they are entitled to have the body of their son. Men, men, I appeal to you for the good name of the country. Let all who are in favor of giving this body over to the undertaker say 'Aye.'" There was a chorous of ayes. 'Now, let all who oppose us say 'No.'" The man beside the body, at the top of his voice yelled "No." "Let all who are in favor of giving this body to the undertaker raise their hands," said Judge Morris. The hands of the crowd went up.—St. Louis Globe-Democrat, August 18, 1915.

THE TRIAL OF WILLIAM WEMMS AND SEVEN OTHER BRITISH SOLDIERS FOR THE MURDER OF CRISPUS ATTUCKS, SAMUEL GRAY, SAMUEL MAVERICK, JAMES CALDWELL AND PATRICK CARR, BOSTON, MASSACHUSETTS, 1770.

THE NARRATIVE.

On the evening of March 5th, 1770, a party of British soldiers fired upon a crowd of citizens of Boston, causing the death of five of them. This incident is known in American history as the "Boston Massacre," and grew out of the strong feeling among the Colonists against having soldiers quartered upon them.

There had been much friction between soldiers and civilians in Boston; a short time before at a place called the Rope Walk, there had been a fight between a number of soldiers and citizens which ended in the defeat of the soldiers and the dangerous wounding of one of their number. This gave rise to great excitement, and a general expectation of a serious affray between the citizens and the soldiers.

Early in the evening of that day, it became apparent that an unusual excitement prevailed in Boston. Clusters of citizens were observed in earnest conference in various quarters of the town, and parties of soldiers were also moving about. About eight o'clock one of the bells was rung as if for fire, and soon after large bands of men were seen in motion, hurrying forward with clubs in their hands, and uttering the fiercest imprecations against the soldiers. An attack was soon made by the mob in Dock square upon some soldiers. The latter were shut up in the barracks by their officers, the mob following them to the gate and provoking them by abusive epithets. The rioters were addressed by "a tall large man

in a red cloak and white wig," and immediately rushed to King street, now State street. Meanwhile, the sentry before the custom house, in that street, was attacked while on duty. He loaded his gun, and retreated up the steps; but the people pressed upon him with bitter imprecations, and he called on the main guard, within hearing, for protection. Captain Preston, the officer of the day, sent a corporal and six men to protect the sentinel, and followed them himself. The mob had now received a great accession of numbers, and the soldiers on their way were hooted at, and pelted with snow balls, ice and sticks. They were then ordered to load. After they had taken their station before the sentinel at the custom house, and were pushing off the people, one of them received a blow with a club, which brought him to the ground. Rising immediately he fired, and the rest, with one or two exceptions, followed his example. Three men were instantly killed, five dangerously wounded and several slightly. The citizens fled and the soldiers withdrew. Captain Preston surrendered that night and the soldiers were committed to jail the next day.

Eight of the soldiers, Captain Preston and some others, were indicted for murder, and on November 27, the trial of the soldiers began. A large number of witnesses were called to prove the allegations in the indictment. They fully identified the prisoners as the soldiers who fired on the people; but the proof was not very precise as to the actual effect of each soldier's firing, with the exception of Killroy and Montgomery. In regard to the former, a witness testified that he saw him among the soldiers. Samuel Gray was standing near the witness, and after one gun had been fired, the witness cried out to Killroy not to fire, but he immediately fired and Gray, who was taking no part in the disturbance, fell dead. Another witness swore that Killroy had previously said to him that he would never miss an opportunity to fire on the people; he had wanted the chance ever since he landed.[a] And he was one of the soldiers who had been in a fight with

[a] Samuel Hemmingway, *post*, p. 426.

the people at the Rope Walk a few days before.[b] It was also shown that Killroy's bayonet was bloody the next morning after the affray.[c] A witness swore that Montgomery was the first one that fired, that when his gun was knocked out of his hand he recovered it and fired again and that he was the one who killed Attucks.[d]

A large number of witnesses testified to the origin of the affair and that the blame was attributed to the soldiers and that the circumstances were not such as to justify them in firing.

The soldiers were defended by John Adams, afterwards President of the United States, and Josiah Quincy. Their plea was self-defense. More than fifty witnesses were examined to prove the facts alleged in their behalf. From their testimony, it was abundantly evident, that there was unusual excitement amongst all classes of the citizens in the beginning of the evening, and there was a general expectation of a serious affray between the soldiers and the town's people. Crowds of people were collected in various parts of the town, armed with clubs and other deadly weapons. Parties of soldiers were also driving through the street, armed with bayonets, cutlasses and clubs, and treating all whom they met in the most insulting manner. In the first part of the evening, several collisions had taken place between the citizens and soldiers, and one in which the soldiers of the fourteenth regiment were engaged, had become quite serious before the officers were enabled to confine the soldiers in their barracks; a citizen having received a severe wound with a cutlass. It was also proved, that the sentry at the custom house was placed there by authority, and could not leave his station; that he was insulted, pressed upon, and pelted with clubs, snow balls, and oyster shells, and that he frequently threatened the aggressors that he would fire, before he called for the assistance of the main guard. It was also proved, that the soldiers of the main guard, on their way to his assistance,

[b] Nicholas Ferreter, *post*, p. 426.
[c] Joseph Croswell, *post*, p. 430; James Carter, *post*, p. 430.
[d] James Bailey, *post*, p. 425.

received the same treatment, but there was no direct evidence that they were ordered to fire by their commanders, although they were frequently dared to do so by their assailants. They were called cowards, dastards, lobsters (in reference to the color of the coats), bloody backs (in allusion to the custom of flogging in the army), and every conceivable insult was thrown at them by the excited crowd that surrounded them.

Most effective speeches to the jury were made by Mr. Adams and Mr. Quincy, and the verdict of the jury was that none of them were guilty of murder, but that two were guilty of manslaughter.

THE TRIAL.[1]

In the Superior Court of Judicature and Court of Assize, Boston, Massachusetts, November, 1770.

HON. BENJAMIN LYNDE,[2]
HON. JOHN CUSHING,[3]
HON. PETER OLIVER,[4]
HON. EDMUND TROWBRIDGE,[5]
} *Judges.*

Nov. 27.

William Wemms, James Hartegan, William McCauley, Hugh White, Matthew Killroy, William Warren, John Car-

[1] *Bibliography.* *"The trial of the British soldiers of the 29th regiment of Foot, for the murder of Crispus Attucks, Samuel Gray, Samuel Maverick, James Caldwell, and Patrick Carr, on Monday evening, March 5, 1770, before the Honorable Benjamin Lynde, John Cushing, Peter Oliver, and Edmund Trowbridge, Esquires, Justices of the Superior Court of Judicature, Court of Assize, and General Gaol Delivery, held at Boston, by adjournment, November 27, 1770. Boston: Published by William Emmons, 1824." The first publication of this report of the trial was made in 1770. It was reprinted in 1807, and then in 1824. Before the trials took place, a work was published, of which the following is the title page: *"A Short Narrative of the Horrid Massacre in Boston, perpetrated in the evening of the fifth of March, 1770, by soldiers of the 29th regiment; which, with the 14th regiment, were then quartered there; with some Observations on the State of Things prior to that Catastrophe. Printed by order of the Town of Boston, and sold by Edes & Gill, in Queen

roll and Hugh Montgomery, British soldiers of the 29th Regiment of Foot, were placed at the bar today charged with the murder of five citizens of Boston, viz.: Crispus Attucks, Samuel Gray, Samuel Maverick, James Caldwell and Patrick Carr.[6]

They pleaded *not guilty.*

street, and T. & J. Fleet, in Cornhill, 1770." In the appendix to this work, there are a large number of depositions taken *in perpetuam* relating to the subject. This publication was intended principally for the English market, and the work was sent there by a vessel hired by the town for the purpose. It was reprinted with Paul Revere's engraving (see *post*, p. 443) and a plan of the town of Boston by John Doggett, Jr., at New York, in 1849.

[*] Chandler's American Criminal Trials. See 1 Am. St. Tr. 116.

[1] LYNDE, BENJAMIN. (1700-1780.) Born Salem, Mass.; Judge Superior Court, 1745-1772.

[2] CUSHING, JOHN. (1695-1778.) Born Scituate, Mass.; Judge Supreme Court, 1747-1771.

[3] OLIVER, PETER. (1712-1791.) Born Boston, Mass.; graduated Cambridge, 1730; Judge Court of Common Pleas, and then Judge of the Supreme Court; Chief Justice, 1772-1776; was a royalist, and went to England in 1776, and died in Birmingham; LL.D. Oxford.

[4] TROWBRIDGE, EDMUND. (1708-1793.) Born Newton, Mass.; graduated Cambridge, 1727; Attorney General of Massachusetts; Judge Supreme Court, 1750; died at Cambridge.

[5] At his Majesty's Superior Court of Judicature, Court of Assize and general Gaol Delivery, begun and held at Boston, within, and for the County of Suffolk, on the second Tuesday of March, in the tenth year of the reign of George the Third, by the Grace of God, of Great Britain, France and Ireland, King, defender of the Faith, &c.

The Jurors for the said Lord, the King, upon their oath present, that Thomas Preston, Esq., William Wemms, labourer, James Hartegan, labourer, William McCauley, labourer, Hugh White, labourer, Matthew Killroy, labourer, William Warren, labourer, John Carrol, labourer, and Hugh Montgomery, labouer, all now resident in Boston, in the County of Suffolk, and Hammond Green, boat builder, Thomas Greenwood, labourer, Edward Manwaring, Esq., and John Munroe, gentleman, all of Boston aforesaid, not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil and their own wicked hearts, did, on the fifth day of this instant, March, at Boston aforesaid, within the county aforesaid, with force and arms, feloniously, wilfully, and of their malice aforethought, assault one Crispus Attucks, then and there being in the peace of God and of the said Lord the King, and that he the said William Warren, with a certain hand gun of the value of twenty shillings, which he the said William Warren then and there held in both his hands, charged with gun powder and two leaden bullets, then and there, feloni-

The following jurors were selected: Joseph Mayo, foreman, and Nathaniel Davis, of Roxbury; Abraham Wheeler and Edward Peirce, of Dorchester; Josiah Thayer, of Braintree; Benjamin Fisher, of Dedham; Samuel Davenport and Joseph Haughton, of

ously, wilfully and of his malice aforethought, did shoot off, and discharge at and against the said Crispus Attucks, and that the said William Warren, with the leaden bullets as aforesaid, out of the said hand gun, then and there by force of the said gun powder so shot off and discharged as aforesaid, did then and there, feloniously, wilfully, and of his malice aforethought, strike, penetrate and wound the said Crispus Attucks in and upon the right breast, a little below the right pap of him the said Crispus, and in and upon the left breast, a little below the left pap of him the said Crispus, thereby giving to him the said Crispus, with one of the bullets aforesaid, so shot off and discharged as aforesaid, in and upon the right breast, a little below the right pap of him the said Crispus, one mortal wound of the depth of six inches, and of the width of one inch; and also thereby giving to him the said Crispus, with the other bullet aforesaid, so shot off and discharged by the said William Warren as aforesaid, in and upon the left breast, a little below the left pap of him the said Crispus, one other mortal wound of the depth of six inches, and of the width of one inch, of which said mortal wounds, the said Crispus Attucks then and there instantly died; and that the aforesaid Thomas Preston, William Wemms, James Hartegan, William M'Cauley, Hugh White, Matthew Killroy, William Warren, John Carrol, Hugh Montgomery, Hammond Green, Thomas Greenwood, Edward Manwaring, and John Munroe, then and there, feloniously, wilfully, and of their malice aforethought, were present, aiding, helping, abetting, comforting, assisting, and maintainng the said William Warren, to do and commit the felony and murder aforesaid.

And so the Jurors aforesaid, upon their said oath, do say, that the said Thomas Preston, William Wemms, James Hartegan, William M'Cauley, Hugh White, Matthew Killroy, William Warren, John Carrol, Hugh Montgomery, Hammond Green, Thomas Greenwood, Edward Manwaring, and John Munroe, then and there, in manner and form aforesaid, feloniously, wilfully, and of their malice aforethought, did kill and murder the said Crispus Attucks, against the peace of the said Lord the King, his crown and dignity.

Jon. Sewall, Att. pro. Dom. Rege.
Wm. Taylor, Foreman.

At the same Court the said James Hartegan, was indicted for the murder of Samuel Gray; and the said Thomas Preston, Esq., William Wemms, William M'Cauley, Hugh White, Matthew Killroy, William Warren, John Carrol, and Hugh Montgomery, for being present, aiding, helping and abetting the said James Hartegan to do and commit the felony and murder aforesaid.

And at the same Court the said Matthew Killroy, was indicted for

Milton; Consider Atherton, of Stoughton; Jacob Cushing, Jr., Josiah Lane, and Jonathan Burr, of Hingham.[6a]

The Clerk. You the prisoners at the bar, these good men, which were last called and do now appear, are those who are to pass between our sovereign Lord the King and you, upon the trial of your several lives; if therefore you will challenge them, or any of them, you must challenge them as they are called to be sworn, before they are sworn, and you shall be heard.

The Jurors being sworn.

The Clerk. Prisoners hold up your hands. Gentlemen of the Jury, look upon the prisoners, and hearken to the charge. Upon each and every of these several indictments the prisoners at the bar have been arraigned, and upon their arraignment have pleaded not guilty, and for trial have put themselves upon God and their country, which country you are, your charge therefore is, to inquire whether they or either of them be guilty of the felony and murder whereof they stand indicted, or not guilty. If they or either of them are guilty, you are to say so; if they or either of them are not guilty, you are to say so and no more. Good men and true, stand together and hearken to your evidence.

Robert Treat Paine[7] and *Samuel Quincy*[8] for the Prosecution.

John Adams,[9] *Josiah Quincy, Jr.,*[10] and *Sampson Blowers,*[11] for the Prisoners.

the murder of one Samuel Maverick; and the said Thomas Preston, William Wemms, William M'Cauley, James Hartegan, Hugh White, William Warren, John Carroll, and Hugh Montgomery, for being present, aiding, helping, abetting, and assisting the said Matthew Killroy, to do and commit the felony and murder aforesaid.

And at the same Court the said John Carrol, was indicted for the murder of one James Caldwell; and the said Thomas Preston, William Wemms, William M'Cauley, James Hartegan, Hugh White, William Warren, and Hugh Montgomery, for being present, aiding, helping, abetting, and assisting the said John Carrol to do and commit the felony and murder aforesaid.

And at the same Court the said Hugh White, was indicted for the murder of one Patrick Carr; and the said Thomas Preston, William Wemms, James Hartegan, William M'Cauley, Matthew Killroy, William Warren, John Carrol, and Hugh Montgomery, for being present, aiding, helping, abetting, and assisting the said Hugh White to do and commit the felony and murder aforesaid.

[6a] Every juryman from the town of Boston being challenged for cause and set aside, there was not an inhabitant of that town on the jury.

Mr. Samuel Quincy. May it please your Honors and you gentlemen of the jury: The prisoners at the bar, are that party of soldiers belonging to his Majesty's 29th regiment, who in the evening of the 5th of March last, were induced from some cause or other to fire on the inhabitants of this town in King street. They are charged in five distinct indictments, with the wilful premeditated murder of five different persons mentioned in the respective bills; to each of these indictments they have severally pleaded, not guilty; and by that plea have thrown upon the crown the burden of proving the fact alleged against them. It is my province therefore to give you evidence in support of this charge, and

[7] PAINE, ROBERT TREAT. (1731-1814.) Born Boston; graduated Harvard, 1749; began practice of law at Taunton, 1759; delegate to Congress, 1774, and one of the signers of the Declaration of Independence; member Massachusetts Constitutional Convention; Attorney General of Massachusetts; Judge Supreme Court, 1790-1803.

[8] QUINCY, SAMUEL. Was an elder brother of Josiah Quincy, Jr., and the last Solicitor General of the Province of Massachusetts before the Revolution. He became a Royalist, it is said, through jealousy of his brother, who rose to higher distinction than himself. At the Revolution he left the country and went to Antigua, where he was appointed King's Attorney. He died there in 1789.

[9] ADAMS, JOHN. (1735-1826.) Born Braintree, Mass.; graduated Harvard, 1755; admitted to Bar, 1758, and practiced at Braintree until he removed to Boston in 1765; member Provincial Congress, 1765; member of Constitutional Congress and one of the signers of the Declaration of Independence; Chief Justice of Massachusetts, 1775; Commissioner to France, 1777; Minister to France, 1785; Vice-President of the United States, and President, 1797-1801; died at Braintree.

[10] QUINCY, JOSIAH, JR. (1744-1775.) Born in Boston, "the most eminent of a well-known family, whose founder emigrated to New England in 1633. At the time of his death, at the age of thirty-one, he had won distinction as a lawyer, and his place was secured in history as the most eloquent, the most clear-sighted, and the most devoted of the men who led the American Colonies in the measures preliminary to the Revolution." He died on shipboard, of consumption, in Gloucester harbor.

[11] BLOWERS, SAMPSON SALTER. Graduated Cambridge, 1763; called to Bar, 1773. He took the Royalist side and left the Province at the beginning of the Revolution and was in 1798 appointed Chief Justice of Nova Scotia.

yours, gentlemen of the jury, to determine whether they are guilty or not.

The cause is solemn and important; no less than whether eight of your fellow subjects shall live or die! A cause grounded on the most melancholy event that has yet taken place on the continent of America, and perhaps of the greatest expectation of any that has yet come before a tribunal of civil justice, in this part of the British dominions.

I am aware how difficult, in cases of this sort, it ever is, and more especially so in these times, and in this trial, to preserve the mind perfectly indifferent; but I remember, we are bound, not only by the natural obligations towards God and man, but also by an oath, to examine into the evidence of fact without partiality or prejudice; I need not therefore to caution you of your duty in this respect. It is upon that evidence and the law resulting from it, you, gentlemen, are, in the language of your oath, to give a verdict; and I will venture, beforehand, to pronounce that verdict righteous, if it is founded in these principles as the rule of your judgment.

It has become my duty, it shall therefore be my endeavor, to acquit myself in the course of this trial with decency and candor; reflecting, that however interesting the question may be, the object of our inquiry is simply that of truth, and that this inquiry is to be conducted by the wisdom of the laws and constitution.

In support of this accusation against the prisoners at the bar, it is incumbent on the crown, to ascertain the following things, viz. The identity of the persons charged. The fact of killing; and the circumstances attending and aggravating that fact.

To this end, I shall immediately produce to you such evidence, from the testimony of credible witnesses, as may be sufficient to sustain the several indictments, and when I have gone through the examination, make such remarks upon it as may be most concise and pertinent to the present issue.

THE WITNESSES FOR THE PROSECUTION.

Jonathan W. Austin. Was on King street that evening; as the soldiers wheeled round, McCauley pushed at me with his bayonet and said, "Damn you, stand off." Then heard several shots; saw McCauley after the fire, reloading.

Ebenezer Bridgham. Was in King street also; next morning at the gaol I apprehended I had seen Warren in King street the evening before, but afterwards saw a person that looked very like him belonging to the same regiment, which occasioned me to doubt; saw also Wemms, the corporal, stationed on the left of the party betwixt him and the tall man; there were a number of people round the party huzzaing, some having sticks; my face was the other way when the first gun went off; heard a noise like the clashing of guns; saw Gray fall; the person that killed him must have been near the centre of the party; the last man that fired, leveled his piece, following a lad running down the street; did not think the soldiers in any danger, from what I saw.

James Dodge. Saw Warren; he is the only one I can swear to; saw about fifty people in the street, but nothing in their hands; saw nothing but snowballs thrown.

Samuel Clarke. Saw White standing sentry at the Custom House; spoke to him; saw no one mistreating him.

Edward G. Langford. Am one of the town watch; came down about nine o'clock to go to the watch-house next the Town-house; was told the people and soldiers were fighting at Murray's Barracks; the matter was over when I got there; returned to King street; there were a number of boys round the sentinel; I told him he need not fear, the boys would not hurt him; soon after this the sentinel went up the custom house steps and knocked at the door; a person within opened it and said something; upon that the sentinel turned round, and pointed his piece at the people opposite to him; I spoke again, told him there was no danger, the boys would not hurt him; I continued talking with the sentry till the party came down, and then went into the street; Gray, one of the sufferers, came and clapped me on the shoulder, saying, what's here to pay? I replied, I do not know, but something I believe will come of it by and by; Gray and I were standing together, talking, I leaning on a stick, and Gray standing with his hands folded in his bosom, without a stick in his hand, neither saying or doing anything to the soldiers; I spoke to Killroy, and after two guns were discharged, seeing him present his piece, said to him, damn you, are you a going to fire? upon this, Killroy levelled his piece and fired directly at Gray, killed him dead on the spot; the ball passed through his head, and he fell on my left foot; he pushed with his bayonet, and pierced through my great coat and jacket.

Francis Archibald. Saw Killroy that night; did not see any snow balls or sticks thrown; went to King street after the firing; saw several dead there.

November 28.

James Brewer. Saw Killroy on the custom house steps; Killroy pushed me with his bayonet; heard several guns fired.

James Bailey. Saw Montgomery, Carroll and White there; saw Montgomery fire first; think Montgomery killed Attucks; Attucks was about fifteen feet from him over the gutter; I did not apprehend myself or the soldiers in danger from clubs, sticks, snowballs or anything else; saw a person strike Montgomery at the corner of Royal Exchange lane; Attucks was not the person.

Richard Palmes. Hearing a disturbance in King street, I was told I had better not go down; I said I will, and try to make peace; I also saw Montgomery there; the stick that struck Montgomery was thrown, I apprehended; Montgomery stepped back and then fired; I heard seven or eight guns, but did not count them; it was seven or eight seconds between the first and second gun; as the last gun went off, Montgomery pushed at me with his bayonet, and I struck him with my cane, and struck the gun down; the bayonet stuck in the snow, and the gun fell out of his hand; I slipped and fell, but quickly recovered; Montgomery attempted again to push me with his bayonet; I threw my cane at him and run; Montgomery attempted to push me a third time, and in that attempt he fell; this gave me an opportunity to get out of his way, or I had been run through the body.

John Danbrooke. Saw there Hartegan, Montgomery and Carrol; I stood about ten or twelve feet from Montgomery; saw no stick strike him, but a little stick flew over our head; was looking on Montgomery when he fired; two men fell; did not hear the second gun, but suppose that by one of the guns Attucks fell; stooped to see if the Mulatto was dead, then turned round and saw another man fall; Attucks at that time was near me, at my left, leaning on his stick.

Jedediah Bass. When I got into King street I saw Montgomery there; saw him push his bayonet at a man that stood near him; I drew back into the lane, and in a minute Montgomery fired.

Thomas Wilkinson. I went down to King street when I heard the noise; was not apprehensive of danger; heard the command to fire given twice; seven guns went off and one flashed; saw no snowballs, ice, oyster shells or anything else thrown by the people; if I had, I should have thought myself in danger, and have retreated; I heard two or three cheers before the party came down, but none afterwards.

Josiah Simpson. Saw White, Wemms, Warren and Hartegan under arms that night; heard eight guns fired.

Nathanial Fosdick. Upon going down King street, the first salutation I had was the pressing of soldiers behind me with the points of their bayonets, crying out, "damn your blood, stand out of the way!" when the first gun was fired, the second man from the right pushed his bayonet at me, and wounded me in the breast; before this two dif-

ferent men pierced me in the arm and elbow quite to the bone.

Samuel Hemmingway. Being in company with Killroy, heard him say he never would miss an opportunity to fire on the people of the town, for he had wanted it ever since he landed; Killroy was not then in liquor nor appeared to be in anger; told me he was a fool for saying so; he said, "I do not care; I will not miss an opportunity for all that."

Nicholas Ferreter. Knew Killroy and Warren; they were at the Rope-walks before this affair happened; at this place a single person challenged him out to fight; a squabble ensued, and the soldier took to his heels; he soon collected a dozen more, came again and had a farther battle; the soldiers were again worsted; we then collected a large number, to the amount of thirty, and in about three-quarters of an hour they came back, and went at it again; in this last squabble the soldiers were a third time worsted.

Robert Williams. Saw the guns following the people as they ran, after the first gun was fired; seven guns were fired; saw no sticks or snowballs fall near them; all the snowballs I saw seemed to be light, and not hard.

Joseph Hiller. Was in King street at the time the soldiers fired at the people on the fifth of March; was at the north end of town when the bells rung, and when I came to the middle was told there was no fire, but a rumpus betwixt the soldiers and the inhabitants; I passed on, the bells still ringing; when I came to Dock square, there were some persons there, who told me it was dangerous to go up; they seemed to be like people that were afraid to pass, because of the danger; others were going up; when I got past the alley, the street was very clear of people; hardly saw anybody; came to the town-house, and saw about thirty lads; have often seen more collected for their diversion; saw the sentry upon the steps of the custom-house door; heard him say nothing, but he had his gun waving, as if it was to defend himself, or to exasperate the people; thought to speak to him, but thinking he might insult me, I declined; began to go away, and met the party of soldiers coming down; that made me stop, because when they got to the custom-house there was a noise something like what they call cheers, and the people went more to the middle of the street; after the soldiers had passed through them, I went down again; there were very few people; the greater part of the soldiers were full to my view; I was walking right before them; they had their guns rested on their hips; when I passed the last man on the left, the first gun was fired from the right; think the time might be twenty seconds before the first gun was fired from the time they formed; in a short time there was another, and then very soon another, and then there was a short space of time again, before the last guns were fired; a little boy ran along and cried "Fire! fire! fire!" as people generally do when there is a fire; a soldier pointed his gun at him and fired, but did not hit him; he was the last but one on the left; I did not mind the first gun, thinking it was only powder to scare the people; when the next

were fired, they were scattering; after the firing ceased, a little boy came and told us some persons were killed; saw them lying in the street; did not imagine it was anybody killed, but supposed that they had been scared and run away, and left their great coats behind them; saw nothing like an attack that could produce any such consequences; went to look at the mulatto man, and heard a noise like the cocking of firelocks, but an officer passed before them and said, "Do not fire on the inhabitants"; the street was in a manner clear; it was as hush as at twelve o'clock at night; the noise of the cocking seemed to come from the right, and passed on to the left.

Mr. Quincy. "How many guns were fired?" "Six was the least, and one missed fire." "How many soldiers were there?" "Six or eight." "Did you see any blows given or any thing thrown?" "No, and I was there the whole time." "Did you see anybody strike the soldiers' guns?" "No." "Did you hear any huzzaing when the soldiers came down?" "There seemed to be a huzza, but when I went down and passed them, they were very still. There was shouting when the soldiers first went down, and it was not two minutes before they fired."

Benjamin Burdick. Am a barber; was in King street on the evening of fifth of March; went immediately up to one of the soldiers, which I take to be that man who is bald on the head (pointing to Montgomery); I asked him if any of the soldiers were loaded; he said "Yes"; I asked him if they were going to fire; he said, "Yes, by the eternal God"; he pushed at me with his bayonet, which I put by with a Highland broad sword which was in my hand; a short time before this, a young man who boarded with me told me that several of the soldiers had a spite at him, and he believed he was in danger; had seen two of them about my house, one of whom was hearkening at the window; saw him again near the house, and asked him what he was after; "Was it not you," says I, "that was hearkening at my window last night?" "What if it was?" he said; I told him to march off, and he damned me, at which I beat him till he had enough of it, and he then went off; the reason of my carrying a sword was, the soldiers spied the young man in the lane and dogged him, for he had been very active in the affray at the ropewalks; they said they would sometime or other have satisfaction, and I considered myself liable to be insulted likewise; when alarmed by the cry of fire, and I had got below the house, my wife called after me, and said, "it is not fire, it is an affray in King street; if you are going, take this," so I took it, and ran down, and I asked the soldier what I just now told you; knocked the bayonet with a sword, which I had in my hand; another pushed at me, and I struck his gun; my face was now towards the soldiers; heard the first gun go off, and then the second gun went off; as I was looking to see if anybody was killed, I saw the tall man standing in a line with me; saw him fall.

Mr. Quincy. "How long had the bells been ringing before you came from home?" "I thought it

was nine o'clock, and did not think anything else, till somebody cried fire." "Did you strike before the firing?" "Yes." "Did you strike as hard as you could?" "Yes, and hit the lock of his gun, and if I had struck a little lower, I should have left a mark that I could have sworn to." "Was the sword in your hand drawn?" "I drew it when the soldier pushed at me, and struck at him as I have mentioned." "How many soldiers were there?" "I did not count them, it appeared to me there were six or eight." "Did you see anything extraordinary to induce them to fire that gun?" "Nothing but a short stick was thrown, which seemed to go clear over all their heads; I heard a clattering of their guns, but what was the occasion of it I do not know." "Might not their iron ramrods occasion it?" "No, I suppose they knocked one gun against another in taking their places; when the mulatto man was dead, and we stooped to take him up, the soldiers presented their arms again, as if they had been going to fire; Captain Preston came, pushed up their guns, and said, 'Stop firing, do not fire.'" "From where was that stick thrown?" "From Royal Exchange lane, and it flew over their heads, almost as high as the sign." "What did you take to be the occasion of the soldier's answer to you?" "I do not know, unless he was affronted at my asking the question of him." "Did you see anybody strike the soldiers before you struck with the sword?" "No, I had not time."

Bartholomew Kneeland. Am a merchant; on the fifth of March, heard the bells ring after nine; went to the front door; saw a number of soldiers, about ten or a dozen, coming towards the town pump; they seemed to make a noise, and one of them got nearly opposite to me, and hallooed, "Damn you, what do you do there?" I made him no answer; he came up to me, and pointed his naked bayonet at my breast, and held it there some time, and told me to get in; I told him to go along; he went towards the post office.

Mr. Quincy. "Do you know what regiment he belonged to?" "To the twenty-ninth." "Did he bid you get in when he asked you what you did there?" "Yes; in a little while I heard a volley of small arms, which I took to be in King street."

Nathaniel Thayer. Am a sealer of wood; on the evening of the fifth of March heard a very great noise, and saw about twenty people coming through Boylston's alley; there was a terrible swearing, and they had clubs and swords, and one thing and another; there came seven soldiers from the main guard, without any coats on; driving along, swearing, cursing and damning like wild creatures, saying, "Where are they? Cut them to pieces, slay them all." They came up to my door; I shut my door and went in; they went round the back lane to King street; this was after nine, before any guns were fired.

Nathaniel Appleton. Am a merchant; on the evening of the fifth of March, a little after nine, I heard a considerable noise in the street; went to the door; I inquired, and was told the soldiers and inhabitants were fight-

ing; waited at the door a minute or two; people were running down in twos and threes at a time; at length the noise subsided, and seemed to be down by Dock square; hearing the bells ring and the cry of fire, I asked where it was; was answered there was none, but the inhabitants and soldiers were fighting; there soon came a party of soldiers from the southward, ten or twelve, I think, with bayonets in their hands, but I apprehended no danger from them; stood on the step of the door; they appeared to be pushing right down the street; then they lifted up their weapons, and I began to apprehend danger; they said something, I do not know what it was, but I went in as fast as I could, and shut the door immediately; went up, looked out of the window, and saw people flying here and there like pigeons, and the soldiers running about like mad men in a fury, till they got to the bottom of the street.

John Appleton. Am a son of Nathaniel Appleton; about nine o'clock was sent on an errand into King street; heard a noise and ran out of the shop where I could see what was the matter; saw some talking to the sentry; thought they were going to quarrel, and came away; coming to Jenkins' alley, my brother with me, there came out about twenty soldiers with cutlasses in their hands; my brother fell and they ran past him, and were going to kill me; I said, "soldiers, spare my life"; one of them said, "no, damn you, we will kill you all;" he lifted his cutlass and struck at my head, but I dodged and got the blow on my shoulder; believe the cutlass was not drawn, for it rattled on my shoulder as if it had been sheathed.

Thomas Marshall. Am a tailor; lived in the next house to the custom house; was at Colonel Jackson's a few minutes after nine on the fifth of March; when I came out into Dock square, all was quiet; saw no persons in the whole square; came up Royal Exchange lane; saw nobody there; saw the sentry at the head of it in peace and quietness; nobody troubling; never saw King street more quiet in my life; went into my house, and in half a minute heard the cry of murder once or twice; I opened the front door; but saw nobody; heard a noise, which seemed to come from Rowe's barracks; stopped a little space, and the first I saw enter King street was a party from the main guard, ten or twelve of whom came rushing out violently, their arms glittering by the moonlight, and crying out, "Damn them, where are they; by Jesus let them come"; some of them turned into Pudding lane, and some went by the town-house steps; I went in and told my family to keep themselves easy, for there was no disturbance near the house; I went to the door again, and saw a party about the head of Quaker lane; they used much the same expressions as the aforesaid party, and cried fire; they passed over the way; I am not positive now; there were a few boys round the sentry; I went and said, "Boys, you have no business with the sentry, go off"; and they went away; have often seen boys with the sentry, and often heard words; the bells were then ring-

ing, and the people began to collect, as they do at the cry of fire, and I thought it was fire; I came to the door, and saw them gathering thick from all quarters, forty, fifty or sixty; when the party came down, I thought it was no more than I had seen every day; thought they had come to relieve the sentry; they seemed to be in a posture of defense, and came through the people; saw no opposition; they passed out of the moonlight into the dark, so that I could not see them, but I wondered to find them tarry so long; heard a gun go off, and thought it was an accident, but in a little time another gun went off, and a third and a fourth, pretty quick, and then the fifth; there seemed to be a small stop in their firing; then had no concern, but before the smoke was well away I saw the people dead on the ground; saw no opposition when they were drawn up, the people were not near them; what opposition might be at the lane I could not perceive, because the box covered that from my view.

Nathaniel Fosdick. Am a hatter. On the evening of the fifth of March, at the cry of fire, came out of my house, and saw the people running down town; when I got by the town house, saw some going down King street; went down to the guard house; saw a number of the soldiers running; asked where the fire was, nobody answered me; went down to the middle of King street, and while I stood there, was pushed from behind with a bayonet; turned round and saw a party of soldiers coming down; asked one the reason of his push at me; he damned my blood, and bade me stand out of their way; said I would not, I was doing harm to no man, and would not stand aside for any one; they passed me some on one side, some on the other. They came to the sentry box, faced round, and formed a circle. Spoke to some of the inhabitants to speak to Preston, to know what the matter was; somebody spoke to him, but what was said, do not know; saw Preston fall back betwixt the fourth and fifth man; the word was given to fire and immediately the right hand man fired; after that I pushed in towards them, and they ran a bayonet at me and wounded me in the arm. I was pushed twice in the arm by two different bayonets; knocked off one of them with my stick; with the other I was wounded in my breast. No blows were given before the guns were fired; saw no insults offered the soldiers.

Joseph Crosswell. Next morning after the 5th of March, in King street, before the soldiers were apprehended, saw Killroy; have known him by sight almost ever since he hath been here; saw his bayonet bloody; the blood was dried on five or six inches from the point.

James Carter. Next morning I observed the same with Mr. Crosswell; I do not know his name, but that's the man (pointing to Killroy); his gun was rested on his right arm; it was covered from the point with blood.

Jonathan Carey. Knew young Maverick, who was killed by the firing in King street, on the 5th day of March; he was at my house that night, at supper with some young lads, and when the

bells rung, as we all thought, for fire, he run out in order to go to it.

John Hill, Esq. Saw a party of the soldiers near the Rope walks with clubs; ordered them to disperse; I commanded the peace; told them I was in commission for the peace; they paid no regard to me or my orders, but cut an old man who was coming by, before my face, and some of them struck at me, but did not hit me; do not know that any of the prisoners were among them.

Mr. Samuel Quincy addressed the jury at length upon the facts which he reviewed, and then laid down the law, which he said was applicable to the case. He closed in these words:

The use I make of the evidence is to show you that from the conduct and appearance of the soldiery in different parts of the town, the inhabitants had reason to be apprehensive that they were in danger of their lives; children and parents, husbands and wives, masters and servants had reason to tremble one for another. This apprehension, together with the ringing of the bells collected numbers of people in different quarters, as is commonly the case when there is any appearance of fire, and the center of the town, when there is a doubt where fire is, becomes naturally the place of rendezvous; this accounts for the number of people that were there, and for some having sticks and canes. I mention this only to take off the force of any evidence or pretence that may be made, that there was an intention of the people to assault, or as it has been expressed, swallow up the soldiers.

I have now gone through the evidence on the part of the Crown, in support of the charge against the prisoners, I shall make a very few observations, and leave it with the prisoners and their counsel to make their defense, and Mr. Paine, who is on the side of the Crown with me, to close the cause.

I think, gentlemen, upon the whole evidence, you can in the first place, have no doubt but that all the prisoners at the bar were of that party of soldiers headed by Capt. Preston, who went down to the custom house on the fifth March, the evening mentioned in the indictments; that the five persons named in those indictments were killed by some one or other of that party, but who they were that killed those several per-

sons, may not be precisely ascertained, except in the case of Killroy, against whom I think you have certain evidence.

It is a rule of law, gentlemen, when the fact of killing is once proved, every circumstance alleviating, excusing, or justifying, in order to extenuate the crime must be proved by the prisoners, for the law presumes the fact malicious, until the contrary appears in evidence.

There is another rule I shall mention also, and that is, that it is immaterial, where there are a number of persons concerned, who gave the mortal blow, all that are present, are in the eye of the law principals. This is a rule settled by the Judges of England upon solid argument. The question, therefore, then will be, what species of homicide this is, and the decision of that question must be deferred until the defense comes out by the evidence on the other side.

The laws of society, gentlemen, lay a restraint on the passions of men, that no man shall be the avenger of his own cause, unless through absolute necessity, the law giving a remedy for every wrong. If a man might at any time execute his own revenge, there would be an end of law.

A person cannot justify killing, if he can by any means make his escape; he should endeavor to take himself out of the way, before he kills the person attacking him.

The COURT thought it improper for the Counsel in opening the cause to anticipate the defense.

Mr. Quincy. I was about to make some further remarks, but it is thought by the honorable Court improper to anticipate what may be urged on the other side. I shall, therefore, rest the case as it is, and doubt not but on the evidence as it now stands, the facts, as far as we have gone, against the prisoners at the bar, are fully proved, and until something turns up to remove from your minds the force of that evidence, you must pronounce them guilty.

MR. JOSIAH QUINCY FOR THE DEFENSE.

Mr. Quincy. Gentlemen of the jury: The prisoners at the bar stand indicted for the murder of five of his Majesty's

liege subjects as set forth in the several indictments, which have been read to you. The persons slain, those indictments set forth, as "being in the peace of God, and our lord the king," at the time of the mortal wounds given.

To these indictments, the prisoners have severally pleaded not guilty, and for their trial have put themselves on God and their country, which country you are: and by their pleas, thus severally pleaded, they are to stand, or fall, according to the evidence which shall respectively apply to them.

By their plea of not guilty, they throw the burden of proof, as to the fact of killing, upon the crown; but, upon that being proved, the matter they allege to justify, excuse, or extenuate, must be adduced by them, and supported by legal evidence. The truth of the facts they may thus allege, it is your sole and undoubted province to determine; but upon the supposition that those facts shall appear to your satisfaction, in the manner we allege, the grand question then to be determined will be, whether such matters, so proved, do, in law, extenuate, excuse, or justify. The decision of this question belongs to another department, namely, the court. This is law, so well known, and acknowledged, that I shall not now detain you by a recital of authorities, but only refer you to Foster's Crown Law, where this point is treated with precision, and fixed beyond controversy. It may not be amiss, however, to assure you, that as certain as the cognizance of facts is within your jurisdiction, so certain does the law, resulting from these facts, in cases of the present kind, seem to reside solely in the court; unless cases, where juries, under direction of the court, give general verdicts, may be denominated exceptions.

In the case now before us, it will not be contested, that five persons were unfortunately killed, at the time the indictments charge; and this case will naturally enough divide itself into three main divisions of inquiry.

First. Whether any homicide was committed?

Secondly. By whom was it committed?

Thirdly. Is there anything appearing in evidence, which will justify, excuse, or extenuate such homicide, by reducing it to that species of offense called manslaughter?

Before we enter upon these inquiries, permit me, gentlemen, to remind you of the importance of this trial, as it relates to the prisoners. It is for their lives! If we consider the number of persons, now on trial, joined with many other circumstances which might be mentioned, it is by far the most important, this country ever saw. Remember the ties you are under to the prisoners, and even to yourselves. The eyes of all are upon you. Patience in hearing this cause is an essential requisite, candor and caution are no less essential. It is tedious and painful to attend a trial of such length; but remember the time which has been taken up by the crown in the opening. By every bond of humanity and justice, we claim an equal indulgence; nay, it is of high importance to your country, that nothing should appear on this trial to impeach our justice, or stain our humanity.

And here let me remind you of a notion, which has certainly been too prevalent, and guard you against its baneful influence. An opinion has been entertained by many among us, that the life of a soldier was of very little value; of much less value than others of the community. The law, gentlemen, knows no such distinction; the life of a soldier is viewed by the equal eye of the law, as estimable as the life of any other citizen.

I cannot in any other way account for what I mention, than by supposing that the indigence and poverty of a soldier, the toils of his life, the severity of discipline to which he is exposed, the precarious tenure by which he is generally thought to hold his life, in the summary decisions of a court-martial have conspired to propagate a sentiment of this kind; but a little attention to the human heart will dissipate such a notion.

The soldier takes his choice, like all others, of his course of life. He has an equal right, with you, or me, so to do. It is best we should not all think alike. Habit makes all things

agreeable; what at first was irksome, soon becomes pleasing. But does experience teach that misery begets in general a hatred of life! By no means. We all reluct at death; we long for one short space more; we grasp with anxious solicitude even after a wretched existence. God and nature have implanted this love of life. Expel, therefore, from your breasts an opinion so unwarrantable by any law, human or divine; let not anything so injurious to the prisoners, who value life as much as you, let not anything so repugnant to all justice, have influence in this trial. The reputation of the country depends much on your conduct, gentlemen; and, may I not add, justice calls aloud for candor in hearing, and impartiality in deciding, this cause, which has, perhaps, too much engrossed our affections; and, I speak for one, too much excited our passions.

The law by which the prisoners are to be tried, is a law of mercy, a law applying to us all, a law, Blackstone will tell us, "founded in principles that are permanent, uniform and universal, always conformable to the feelings of humanity, and the indelible rights of mankind." How ought we all, who are to bear a part in this day, to aim at a strict adherence to the principles of this law; how ought we all to aim at utterly eradicating every undue bias of the judgment; a bias subversive of all justice and humanity!

Another opinion, equally foreign to truth and law, has been adopted by many. It has been thought, that no possible case could happen, in which a soldier could fire without the aid of a civil magistrate. This is a great mistake—a very unhappy mistake indeed! one, I am afraid, that had its influence on the fatal night which we all lament. The law, as to the present point, puts the citizen and soldier under equal restraint. What will justify and mitigate the action of the one, will do the same to the other. Let us bear this invariably in mind, in examining the evidence. But before we proceed to this examination, let us take a transient view of some occurrences preceding and subsequent to, the melancholy fifth of March.

About five of six years ago, it is well known, certain measures were adopted by the British parliament, which gave a general alarm to this continent. Measures were alternately taken in Great Britain, that awakened jealousy, resentment, fortitude and vigilance. Affairs continued long fluctuating. A sentiment universally prevailed, that our dearest rights were invaded. It is not our business here to inquire touching these delicate points. These are concernments, which, however interesting or important in themselves, we must keep far away from us, when in a court of law. It poisons justice, when politics tincture its current.

I need not inform you, how the tide rose, as we were advancing towards the present times. The general attention became more and more roused—people became more and more alike in opinion and practice. A vast majority thought all that was dear was at stake—sentiments of liberty—property—ignominious bondage—all conspire to increase the ferment. At this period the troops land. Let us here pause and view the citizen and the soldier.

The causes of grievance being thus spread far and wide, the inhabitants viewed the soldiery as called in, foreign from their prime institution, to force obedience to acts, which were, in general, deemed subversive of natural as well as constitutional freedom. With regard to the universal prevalence of ideas of this kind, it does not fall within our present plan, to give you direct, positive evidence. It would be too foreign to the present issue, though pertinent enough, when considered as a clue to springs and motives of action, and as an additional aid to form a just judgment in our present inquiry. You, gentlemen, who come from the body of the country, are presumed to know these facts, if they are true; nay, their notoriety must be such, provided I am not mistaken in my conjecture, that the justness of my observation on this matter must be certainly confirmed by your own experience. I presume not in this, or any other matter of fact, to prescribe to you; if these sentiments are wrong, they have no influence; if right, they ought certainly to have their due weight.

I say, gentlemen, and appeal to you for the truth of what I say, that many on this continent viewed their chains as already forged; they saw fetters as prepared; they beheld the soldiers as fastening, and riveting for ages, the shackles of their bondage. With the justness of these apprehensions, you and I have nothing to do in this place. Disquisitions of this sort are for the senate, and the chamber of council, they are for statesmen and politicians, who take a latitude in thoughts and action; but we, gentlemen, are confined in our excursions, by the rigid rules of law. Upon the real, actual existence of these apprehensions, in the community, we may judge; they are facts falling properly within our cognizance, and hitherto may we go, but no farther. It is my duty, and I ought to impress it on your minds; and, you, gentlemen, ought to retain the impression. You are to determine on the facts coming to your knowledge; you are to think, judge, and act, as jurymen, and not as statesmen.

Matters being thus circumstanced, what might be expected? No room was left for cordiality and friendship. Discontent was seated on almost every brow. Instead of that hospitality, which the soldier thought himself entitled to, scorn, contempt, and silent murmurs were his reception. Almost every countenance lowered with a discontented gloom, and scarce an eye but flashed indignant fire. Turn and contemplate the camp. Do we find a more favorable appearance? The soldier had his feelings, his sentiments, and his characteristic passions also. The constitution of our government has provided a stimulus for his affections. The pride of conscious virtue, the sense of valor, the point of honor. The law had taught him to think favorably of himself; had taught him to consider himself as peculiarly appointed for the safeguard and defense of his country. He had heard, that he put not off the citizen, when he entered the camp; but because he was a citizen, and wished to continue so, he made himself, for awhile, a soldier. How stinging was it to be stigmatized as the instrument of tyranny and oppression! How exasperating to be viewed as aiding to inthrall his country! He felt

his heart glow with an ardor, which he took for a love of liberty and his country, and had formed to himself no design fatal to its privileges. He recollected, no doubt, that he had heretofore exposed himself for its service. He had bared his bosom in defense of his native soil, and still felt the smart of wounds received in conflict for his king and country. Could that spirit, which had braved the shafts of foreign battle, brook the keener wounds of civil contest? The arrows which now pierced him, pierced as deep and rankled more than those of former times.

It is rational to imagine much harmony could long subsist? We must take human nature as we find it, and not vainly imagine, that all things are to become new at such a crisis. There are an order of men in every commonwealth, who never reason, but always act from feeling. That their rights and liberties were filched away one after another, they had often been told. They had been taught by those whom they believed, that the axe was now laid to the root of the tree, and one more stroke would complete its fall. It was in vain to expect to silence or subdue these emotions by reasons, soothings or dangers. A belief, that nothing could be worse than the calamities which seemed inevitable, had extended itself on all sides, and arguments drawn from such sources had little influence. Each day gave rise to new occurrences, which increased animosities. Heartburnings, heats and bickerings became more and more extensive. Reciprocal insults soured the temper, mutual injuries embittered the passions. Can we wonder, that when everything tended to some important action, the period so soon arrived? Will not our wonder be increased to find the crisis no sooner taking place, when so many circumstances united to hasten its approach? To use an allusion somewhat homely, may we not wonder that the acid and the alkali did not sooner ferment?

A thought here imperceptibly forces itself on our minds, and we are led to be astonished, that persons so discordant in opinion, and so opposite in views, attachments and connections should be stationed together. But, here, gentlemen, we

must stop. If we pursue this inquiry, at this time, and in this place, we shall be in danger of doing great injustice. We shall get beyond our limits. The right of quartering troops in this province must be discussed at a different tribunal. The constitutional legality, the propriety, the expediency of their appointment, are questions of state, not to be determined, or even agitated by us, in this court. It is enough for us, if the law takes notice of them when thus stationed, if it warrants their continuance, if it protects them in their quarters. They were sent here by that authority, which our laws know; they were quartered here, as I take it, agreeably to an act of the British parliament; they were ordered here by your sovereign and mine.

Let me here take a method very common with another order of men. Let me remind you of what is not your duty.

Gentlemen, great pains have been taken by different men, with different views, to involve the character, the conduct and reputation of the town of Boston, in the present issue. Boston and its inhabitants have no more to do with this cause, than you, or any other members of the community. You are, therefore, by no means to blend together two things, so essentially different, as the guilt or innocence of this town and the prisoners. The inhabitants of Boston, by no rules of law, justice or commen sense, can be supposed answerable, for the unjustifiable conduct of a few individuals, hastily assembled in the streets. Every populous city in like circumstances, would be liable to similar commotions, if not worse. No rational or honest man will form any worse opinion of this metropolis, for the transactions of that melancholy night. Who can, who will, unnecessarily interest themselves to justify the rude behavior of a mixed and ungovernable multitude? May I not appeal to you, and all who have heard this trial thus far, that things already wear a different aspect from what we have been heretofore taught to expect? Had any one told you, some weeks ago, that the evidence on the crown side would have appeared in the present light, would you have believed it? Can anyone think it

his duty to espouse the cause of those assembled in King street? I think not; but lest my opinion should not have any weight, let me remind you of an author, who, I could wish, were in the hands of all of you; one whom I trust you will credit. I am sure you ought to love and revere him. I wish his sentiments were engraven in indelible characters on your hearts. You will not suspect him of being unfriendly to liberty; if this cause and its events must be interwoven with a matter so foreign to it. I allude to the third letter of the "Farmer of Pennsylvania," to his countrymen.[a]

"The cause of liberty," says that great and good writer, "is a cause of too much dignity to be sullied by turbulence and tumult; it ought to be maintained in a manner suitable to her nature. Those who engage in it should breathe a sedate yet fervent spirit, animating them to actions of prudence, justice, modesty, bravery, humanity and magnanimity." What has there transpired on this trial, savoring of any of these virtues? Was it justice, or humanity, to attack, insult, ridicule, and abuse a single sentinel on his post? Was it either modest, brave or magnanimous, to rush upon the points of fixed bayonets, and trifle, vapor and provoke, at the very mouths of loaded muskets? It may be brutal rage, or wanton rashness, but not, surely, any true magnanimity.

"I hope," says the same eminent writer, "my dear countrymen, that you will in every colony be upon your guard against those, who at any time endeavor to stir you up, under pretence of patriotism, to any measures disrespectful to your sovereign, and our mother country." By this it should seem, as though the "Farmer" never expected any period would arrive, when such measures would be warrantable. Now what more disrespectful to our parent country than to treat

[a] The celebrated "Farmer's Letters" were written against the revenue acts of Great Britain, by John Dickinson, of Pennsylvania. The depth of research, force of argument, and perspicuity of style, which appeared in these letters, made them popular with all classes of readers in America. Dr. Franklin caused them to be reprinted in England, with a commentary preface from his own pen. Sparks's Life of Franklin, p. 456.

with contempt a body of men, stationed, most certainly, by the consent of her supreme legislature, the parliament of Britain? What more disrespectful to our common sovereign, than to assume the sword of justice, and become the avengers of either public or private wrongs? Though the soldiers, who appeared in the earlier part of the evening in Cornhill, acted like barbarians and savages, they had now retired, and were confined in their barracks; what though an impertinent boy had received unjustifiable correction from the sentinel; the boy, and the persons in Cornhill, must have recourse only to the law for their redress. Courts of law are styled *"vindices injuriarum,"* the avengers of injuries, and none others are to assume this prerogative. The law erects itself as the supreme, dernier resort, in all complaints of wrong; and nothing could more essentially sap our most important interests, than any countenance to such dangerous encroachments on the domains of municipal justice.

But, finally, to finish with the justly celebrated "Farmer." "Hot, rash, disorderly proceedings injure the reputation of a people, as to wisdom, valor, and virtue, without procuring the least benefit." Thus have you the sense of this, with us, great authority. And let me ask all those who have thought the cause of this country connected with the agents of the assembly in King street, whether the proceedings of that unhappy night were hot, rash, or disorderly? If they were, have they not, in the opinion of this great friend of liberty, injured our reputation, as to wisdom, valor and virtue; and that too, without procuring the least benefit? Who then would sacrifice his judgment, and his integrity, to vindicate such proceedings?

To what purposes the soldiers were sent; whether it was a step warranted by sound policy, or not, we shall not inquire; we are to consider the troops, not as the instruments for wresting our rights, but as fellow citizens, who, being to be tried by a law extending to every individual, claim a part in its benefits—its privileges—its mercy. We must steel ourselves against passions which contaminate the fountain of

justice. We ought to recollect that our present decisions will be scanned, perhaps through all Europe. We must not forget, that we ourselves will have a reflective hour—an hour in which we shall view things through a different medium—when the pulse will no longer beat with the tumults of the day—when the conscious pang of having betrayed truth, justice and integrity, shall bite like a serpent and sting like an adder.

Consider, gentlemen, the danger which you, and all of us are in of being led away by our affections and attachments. We have seen the blood of our fellow men flowing in the streets. We have been told that this blood was wrongfully shed. That is now the point in issue. But let it be borne deep upon our minds that the prisoners are to be condemned by the evidence here in court produced against them, and by nothing else. Matters heard or seen abroad are to have no weight; in general, they undermine the pillars of justice and truth. It has been our misfortune that a system of evidence has appeared in the world against us.[b] It is not our business to blame anyone for this. It is our misfortune, I say. It should be remembered, that we were not present to cross-examine; and the danger which results from this publication being in the hands of those who are to pass upon our lives, ought to be guarded against. We say we are innocent, by our plea; and we are not to be denounced guilty by a new species of evidence—unknown in the English system of criminal law.

But, as though a series of *ex parte* evidence was not enough, all the colors of the canvas have been touched, in order to freshen the wounds, and by a transport of imagination, we are made present at the scene of action. The prints exhibited in our houses have added wings to fancy; and, in

[b] This refers to the narrative of the Boston committee which was entirely erroneous in many respects, and the depositions were very different from the testimony of the same witnesses at the trial, when the excitement had somewhat subsided, and they were subjected to a cross-examination. (See Bibliography, *ante*, p. 418.)

the fervor of our zeal, reason is in hazard of being lost;[c] for, as was elegantly expressed by a learned gentleman at the late trial, "the passions of man, nay, his very imaginations, are contagious." The pomp of funeral and the horrors of death have been so delineated, as to give a spring to our ideas and inspire a glow incompatible with sound deliberative judgment. In this situation, every passion has been alternately predominant. They have each in its turn subsided in degree, and then have sometimes given place to despondence, grief and sorrow. How careful should we be, that we do not mistake the impressions of gloom and melancholy for the dictates of reason and truth. How careful, lest, borne away by a torrent of passion, we make shipwreck of conscience.

Perhaps you may be told, gentlemen, as I remember it was said, at the late trial, that passions were like the flux and reflux of the sea, the highest tides always producing the lowest ebbs. But let it be noticed, that the tide, in our political ocean, has yet never turned; certainly the current has never set towards the opposite quarter. However similes may illustrate, they never go for proof; though, I believe it will be found, that if the tide of resentment has not risen of late, it has been because it had already reached the summit. In the same mode of phraseology, if so homely an expression may be used, perhaps, as the seamen say, it has been high-water slack; but I am satisfied that the current has not yet altered its course, in favor of the prisoners at the bar.

Many things yet exist sufficient to keep alive the glow of indignation. I have aimed at securing you against the catching flame. I have endeavored to discharge my duty

[c] Immediately after the occurrence, a print was published by Paul Revere, which was circulated through the country. It was very famous in that day, and there were few houses in which it was not an ornament. It gives a somewhat false idea of the scene it purports to represent. The soldiers are represented as drawn up in a line before the custom house (on which is a large sign containing the fancy title of Butchers' Hall), and at the bidding of their commander, deliberately firing at the inhabitants, several of whom fall dead in the street. (See Bibliography, *ante*, p. 418.)

in this respect. What success will follow those endeavors, depends on you, gentlemen. If being told of your danger will not produce caution, nothing will. If you are determined in opinion, it is vain to say more; but if you are zealous inquirers after truth, if you are willing to hear with impartiality, to examine and judge for yourselves,—enough has been said to apprize you of those avenues, at which the enemies of truth and justice are most likely to enter, and most easily to beset you.

Gentlemen of the jury, I shall now, for argument's sake only, take it for granted, that the fact of killing has been proved upon all the prisoners: you are sensible that this is not really true, for as to this point, there are several of the prisoners upon whom the fact is not fixed. But as I shall hereafter take occasion to consider the distinct case of each prisoner, as he is effected by the evidence, I at present choose to avoid confusion, and apply myself to the full strength of the crown; and, upon a supposition, that all the prisoners are answerable for the act of any one, see how the prisoners are chargeable, by the evidence already offered, with the crime of murder;—or rather endeavor to point out to you those facts, appearing by the evidence on the crown side, which will amount, in law, to a justification, an excuse, or at least, an extenuation of their offense; for, we say, that, give the evidence for the king its full scope and force, and our offense is reduced, at least, to manslaughter; in which case, we claim the privilege of that law, by the sentence of which, if guilty, we must suffer the pains of death; a privilege, we can never again claim, a privilege, that by no means implies exemption from all punishment; the offender becomes liable to imprisonment for a year, incurs a forfeiture of all goods and chattels, and, till he receives the judgment of law, is to all intents a felon, subject to all the disabilities and other incidents of a felon. Without taking up time, in attending and discussing points, no way pertinent to the present issue; without a tedious recapitulation of circumstances, with which, I

take it, we have no more concern, than either of you, gentlemen; I say, passing over all these matters as foreign to this trial; let us state evidence appearing even from the crown witnesses.

Mr. Quincy then took up the evidence against the prisoners, pointing out the circumstances which favored them; and then stated the points he expected to exhibit on the part of the prisoners, to show that all which they did was necessary and proper in self defense.

THE WITNESSES FOR THE PRISONERS.

James Crawford. On the night of March 5th, in going home, I met uncommon numbers of people with sticks—not common walking sticks, but large cudgels.

Archibald Gooll. That evening I saw people from all corners running with sticks in their hands—uncommon sticks.

Archibald Wilson. That night I saw a great number of people come from the north-end; they made two or three sundry attacks up the lane where the barracks were; they had sticks or staves, I do not know what they are called; they cried fire; I said it was very odd to come to put out a fire with sticks and bludgeons.

William Hunter. Was in my own house, and Mr. Wilson, witness, with me; Mr. Mitchelson came in and told us there was a disturbance amongst the inhabitants and soldiers; saw great numbers coming up from the north end, with large sticks in their hands.

David Mitchelson. That night saw a large number of people assembled together; the bells rang; people thought it was fire; heard it proposed to attack the guard; saw a man with a red cloak and white wig haranging the crowd.

John Short. The evening of the 5th of March, after the nine o'clock bell had rung, heard the bells ring again; supposed for fire; went up as far as Faneuil Hall, and to Mr. Jackson's shop; there were a number of people in Cornhill at the time.

Benjamin Davis. I heard a number of people and great noises; saw the people collected close to Boylston's alley, and learned that it was the town's people and soldiers quarreling; the sound was like people fighting with clubs; two young men came up, and said, "Will you go and help us to fight the soldiers?" I said, "No"; one of them had a cloak, and said, "If you will not go, hold my cloak," and went away with the other, inquiring where were any clubs or cord-wood sticks; they hallooed, "Fire! fire!"

Sheubel Hewes. Heard the fire bells; they told me it was no fire, but the people quarreling; saw a lot of young people pulling the legs out of the stalls in the market.

James Selkrig. Saw a considerable number of people coming from the North End, all armed

with white sticks; they made attacks on the barracks, and were always drove back; always when a fresh party came from the north part of the town, they made a new attack; there were about five or six different attacks made; saw a large man with a red cloak and white wig; they gathered round him, and he spoke two or three minutes, and they gave some different cheers for the Main Guard; they said they would do for the soldiers.

Archibald Bowman. Saw a number of people hallooing fire, fire, in different quarters; numbers inquiring where the fire was; they gathered in a large body; some went up by way of the post-office, some went up the lane by the pump, and some came down forcibly as if chased; they whistled through their fingers and cried fire; observed a gentleman with a red cloak and white wig; the crowd gathered round him; they staid a little while with him, and then drew off and huzzaed and then dispersed.

John Cookson. Was at the Green Dragon on evening of 5th March; heard ringing of the bells; some one said it was not fire, but a rumpus.

William Strong. On evening of the 5th of March was at Mr. Marston's; we heard the cry of fire; some said we will go out and see where the fire is; went and saw several people running to and fro; asked what the matter was; they said a soldier had killed a boy; some people said, "We will go back again and get our sticks; saw a number of people running up to King street; one of them struck the ground with his stick and shivered it; the people encroached on the sentinel; he retreated back and they went forward; at last I saw him go on the steps of the Custom-house, and they went closer, and he set his back to the door and loaded; heard the ball go down distinctly; about ninety or more people were there. The generality of them were young men; he presented his gun, and said, "Keep off or I will fire upon you"; the reply was, "Fire, fire and be damned;" there was a man standing by me; he had the butt end of a bat in his hand, and said he would throw it at the sentinel; I said, "Do not, for he will fire at whatever place it comes from";

William Dixon. Went to the balcony, and saw people going up that alley where the barracks are; they increased from the North end to pretty large numbers; then gathered together in a crowd opposite to where I stood, and huzzaed for the main guard.

John Gillespie. On the evening of 5th of March I met not less than fifty people, with white sticks in their hands, in small parcels; somebody said there was fire; met Mr. Fleeming's man coming back, and he said it was no fire, but the soldiers and inhabitants fighting; saw two engines, and the people putting their buckets and bags in people's houses; inquired where the fire was; got the same answer, no fire, but the soldiers and inhabitants fighting.

Thomas Knight. On 5th of March heard the bells ring, which I took for fire; ran to the door; the people were passing pretty thick, some with buckets, some with bags, and numbers with

sticks and clubs; they said there was no fire, but some disturbance with the soldiers and inhabitants; returned into the room sometimes, but feeling uneasy, went to the door again, and saw several companies of people pass, one company consisting of eight or ten had white sticks or clubs in their hands.

Capt. John Goldfinch. The 5th of March, about nine in the evening, was passing over Cornhill; saw a number collected by the passage to the barracks; went towards it; two or three called me by name, and begged me to endeavor to send the soldiers to their barracks, or else there would be murder; the people were pelting the soldiers with snowballs; the soldiers were defending themselves at the entrance.

James Thompson. That evening, going up King street, met about fifteen persons with sticks in their hands; pretty large sticks.

Lt. William Carter. On evening of 5th of March heard the bell ring; was told there was a riot in King street; saw several men pass, not in a body, but in twos and singly; they walked faster than people generally do on business; not a man passed but what had either a club, sword, hanger, cutlass or gun.

Patrick Keaton. On the evening of 5th of March saw people coming from the North End, with sticks and clubs in their hands; it was about nine o'clock; saw a tall mulatto fellow, the same that was killed; he had two clubs in his hand; he said, "Here, take one of them"; I did so; I dropt the stick in the snow; he went on, cursing and swearing at the soldiers; I had not been long there 'till three or four guns went off, and I went home.

John Buckley. That night saw the crowd in King street; I thought the sentinel was in danger; that if he came off with his life he would do well.

John Frost. Saw the crowd; heard them call to the sentinel, "Fire, damn you, fire; you dare not fire."

William Botson. Was at the Market; saw no soldier but one, and he was the sentinel; he got on the steps and loaded; bye and bye saw a party come down from the main guard, and all that stood round cried fire! fire! bye and bye they did fire, as soon as I saw a man drop, I went away; saw snowballs thrown both at the sentinel and at the party.

John Waddel. On 5th March saw the soldiers going down to the Custom House; saw the soldiers very much molested by the people of the town throwing snowballs, sticks and more rubbish than I can mention; saw, also, the sentinel molested at the Custom-House door; saw a soldier knocked down; but who he was I cannot tell; the firelock flew out of his hand, and he took it up again and fired, and I think he was the first that fired; saw Hartegan; was acquainted with him in Halifax, and kept my eye upon him more than upon any of the rest.

Daniel Cornwall. On evening of the 5th March, in Milk street, I heard the bells ring; a young man told me, a rascally soldier had struck one of the inhabitants was a cutlass; I replied, where is the damned villain gone? he gave me no answer; presently they turned round and gave two

or three cheers; saw them throwing oyster shells and snowballs at the sentry at the Custom House door; he was on the steps; some were hallooing out, "Let us burn the sentry box, let us heave it overboard"; but they did neither.

John Ruddock, Esq. As I went home met a number of boys with clubs; they went so for several months before; they choosed to do so, because they had been so often knocked down by the soldiers; some said the soldiers were going to fight with the people.

Newton Prince. When the bells rung was at my own house; asked where the fire was; somebody said it was something better than fire; met some with clubs, some with buckets and bags, and some running before me with sticks in their hands; went to the Town House, and saw the soldiers come out with their guns and bayonets fixed; saw Capt. Preston with them; there were a number of people by the west door of the Town House; they said "let's go and attack the main guard"; some said, "for God's sake do not meddle with them;" they said, "by God, we will go"; others again said, "do not go"; after a while they huzzaed and went down King street; saw people with sticks striking on their guns at the right wing; apprehended danger, and that the guns might go off accidentally; had not got to the centre of the party, before the guns went off; as they went off I ran, and did not stop till I got to the upper end of the Town House; the crowd said, "fire, damn you, fire, fire, you lobsters, fire, you dare not fire."

Gregory Townsend. Just after the bell rung nine, I saw numbers of people running from the South End, some had buckets, the principal number had clubs in their hands; numbers were coming with buckets, and the rest said, "Damn your bloods, do not bring buckets, bring clubs."

November 30.

Richard Hirons. Am a physician; on the evening of March 5th, a little after eight, hearing a noise and disturbance in the street, went out to know what it was; was told there was a difference between the town's people and soldiers; saw several soldiers pass and repass; some with bayonets and some with clubs; saw a number of people running to and fro in the street; shut my door and went in; heard a person running through Boylston's alley with great violence; he ran towards the barrack gate and cried out, "Town-born, turn out; town-born, turn out"; heard this repeated twenty or thirty times; it was the constant cry; remember to have heard the voice of a person whom I took to be Ensign Maul, say, "Who is this fellow, lay hold of him"; this cry of "town-born, turn out," was repeated for seven or eight minutes, when I heard the voices of a great many more; the collection of such a number, with a noise of the clubs, induced me to lock my door, put out my light in the front part of my house, and to go up stairs into the chamber fronting the barracks; when there, observed four or five officers of the twenty-ninth regiment standing on their own steps, and some twenty or thirty of the town's people surrounding the steps; about that time,

there came a little man, who said, "Why do you not keep your soldiers in their barracks"? they said they had done everything they possibly could, and would do everything in their power to keep them in their barracks; on which he said, "Are the inhabitants to be knocked down in the streets, are they to be murdered in this manner"? The officers still insisted they had done their utmost, and would do it, to keep the soldiers in their barracks; the same person then said, "You know the country has been used ill, you know the town has been used ill, we did not send for you, we will not have you here, we will get rid of you," or "we will drive you away"; the officers still insisted they had done their utmost, and would do it, to keep the soldiers in their barracks, and begged the person to use his interest to disperse the people, that no mischief might happen; whether he did address the people or not, I cannot say, for the confusion was so great I could not distinguish; immediately the cry of "home," "home," was raised, on which the greatest part of them, possibly two-thirds went up Boyston's alley towards the Town House, huzzaing for the main guard; then observed more of the town's people coming from towards the market; there was a squabble and noise between the people and the officers; what was said I could not hear; next a little boy came down the alley, clapping his hand to his head, and crying, he was killed, he was killed; on which one of the officers took hold of him, and damned him for a little rascal, asking him what business he had out of doors; the boy seemed to be about seven or eight; a little time after that, saw a soldier come out of the barrack gate with his musket; he went directly facing the alley, in the middle of the street, and kneeled down on one knee, and said, "now, damn your bloods, I will make a lane through you all"; while he was presenting, Mr. Maul, an ensign, laid hold of him, and took the musket from him, shoved him towards the barrack, and I think gave him the musket again, and charged him at his peril to come out again. In a little time a soldier came out again; he repeated much the same words as the other, and had his gun in his hand; he was presenting his firelock, when Mr. Maul knocked him down, took his musket from him, drove him into the barracks, and the barrack gate was then shut; Dr. Cooper's bell rung, and I heard some officer say, "go and stop that bell from ringing"; it did not ring a great while; saw Captain Goldfinch, of the fourteenth, on the steps with the officers of the twenty-ninth; there came up a little man, who he was I do not know, but in a much different manner from what the other did; he requested the soldiers might be kept in their barracks, and that the officers would do every thing in their power to keep them there; the officers said they had, and would do so; and, as the soldiers were in their barracks, begged the people might go away; this little man said to the people, "gentlemen, you hear what the officers say, that the soldiers are all in their barracks, and you had better go home; on which the cry was, "home,

home"; then a great many went up the alley again, and I heard the expression, "let us go to the main guard"; Captain Goldfinch was still on the steps; I heard his voice still talking, and I think he desired every person would go away; while he was talking, heard the report of a musket; the report of a second gun; presently a third; upon the firing of the first gun, heard Captain Goldfinch say, "I thought it would come to this, it is time for me to go"; I then saw a soldier come down the alley from Cornhill, and go up to the steps where the officers stood; he said, they fired from or upon the main guard; then heard the drum at the main guard beat to arms; I came down stairs and did not go out till I was sent for to some of the wounded people; I was sent for to Maverick; about two hours before his death, I asked him concerning the affair; he said he went up the lane, and just as he got to the corner, he heard a gun; he did not retreat back, but went to the Town House; as he was going along he was shot.

Benjamin Davis, Jr. On evening of the 5th of March, near the bottom of Royal Exchange lane, saw a mob by Mr. Greenleaf's; went right along into King street, where I saw the sentinel; a barber's boy, who was there crying, said the sentry had struck him, and I asked him what business he had to do it; I went home and staid at the gate in Green's lane some time; Samuel Gray (one of the persons killed that night in King street) came along, and asked where the fire was; I said there was no fire, it was the soldiers fighting; he said, "damn it, I am glad of it, I will knock some of them on the head"; he ran off; I said to him, "take heed you do not get killed in the affray yourself"; he said, "do not you fear, damn their bloods"; he had a stick under his arm.

Alexander Cruckshank. Am a jeweler; on the evening of fifth of March, as the clock struck nine, came up Royal Exchange lane; heard some boys abusing the sentinel; often saw the two boys go towards the box and back to the sentinel with a fresh repetition of oaths; they called him lobster and rascal, wished he was in hell's flames, often and often; neither heard nor saw the sentinel do anything to them; he only said it was his post, and he would maintain it, and if they offered to molest him, he would run them through; upon his saying this, two boys made up some snowballs and threw them at the sentinel, who called out, "guard, guard," two or three times, very loud; upon that, some soldiers came from towards the main guard, seven or eight; some had bayonets, some swords, others sticks in their hands; on their approach, these people and the boys who stood before the box, went up to the back of the Town House, by the barber's shop; I crossed King street; three or four of these soldiers came down to me, damned me, and asked who I was; I said, I was going home peaceably, and interfered with neither one side or another; one of them, with a bayonet or sword, gave me a light stroke over my shoulder, and said, "friend, you had better go home, for by all I can foresee, there will be the devil to

pay or blood shed this night"; they turned and went towards the sentinel, at the Custom House; I then went up by the guard house, and when I had passed it a little way, I saw the soldiers who went down before the Custom House returning back, with a mob before them, driving them up past the guard house; the number of people before the soldiers were sixteen or eighteen; some of them were boys, but most of them were men from twenty to five-and-twenty.

William Davis. Am sergeant major of the 14th regiment; on Monday evening, 5th March, about eight o'clock, was going towards the North End in Fore street, near Wentworth's wharf, and saw about two hundred people in the street before me; I stept aside; saw several armed with clubs, and large sticks, and some had guns; they came down by twos and threes abreast; saw no soldier in the street; heard them saying, "damn the dogs, knock them down, we will knock down the first officer or bloody backed rascal we shall meet this night"; some of them then said they would go to the southward, and join some of their friends there, and attack the damned scoundrels, and drive them out of town, for they had no business here; apprehending danger in my regimentals, I went into a house at the North End and changed my dress; on my return, coming near Dock square, heard a great noise, a whistling and rattling of wood; saw a great number of people in the Market, knocking against the posts and tearing up the stalls, saying, "damn the lobsters, where are they now?" Heard several voices, some said, "let us kill that damned scoundrel of a sentry, and then attack the main guard"; some said, "let us go to Smith's barracks"; others said, "let us go to the rope-walks"; they divided; the largest number went up Royal Exchange lane, and another party up Fitch's alley, and the rest through the main street, up Cornhill; I went into King street; looking towards the Custom House, saw a number of people seemingly in great commotion; near the fish stall at Oliver's dock met a great number of people coming towards King street, with clubs and large sticks; it was past nine; one of them was loading his piece by Oliver's dock; he said he would do for some of these scoundrels that night; the people were using threats against the soldiers and commissioners, "damn the scoundrels and villains of soldiers and commissioners, and damn the villain that first sent them to Boston; they shall not be here two nights longer"; went to my barracks; the roll had been called, and there was not a man absent, except some officers that quartered in the town, and their servants; immediately after, I heard a gun fired in King street, and afterwards two or three more.

Nathaniel Russell. Am a chair-maker; on the evening of fifth March, between nine and ten o'clock, being at my own house and hearing the bells ring, ran out to know where the fire was; down to the South meeting house saw men and boys armed with clubs, coming along; some were damning the soldiers, that they would destroy them, and sink

them, and they would have revenge for something or other, I could not tell what; that they would drive them before them; some said they had been to Rowe's barracks, and had driven the soldiers or the sentinel into the barracks; saw a number of people with clubs, and at a distance a parcel of soldiers at the Custom House; went down to the right of them, where Captain Preston stood; had not been there a minute before the guns were fired; saw several things thrown at the soldiers, as they stood in a circle by the Custom House; before I turned, did not see anything strike the guns; but I heard something strike, and the guns clatter; there was a great noise, the cry was, "fire, damn you, fire"; the soldiers did not say anything to the people; they never opened their lips; they stood in a trembling manner, as if they expected nothing but death; they fired first on the right.

Henry Knox. Am a stationer; was at the North End, and heard the bells ring; heard it was not fire, but that the soldiers and inhabitants were fighting; there were a number of people, an hundred and fifty or two hundred; I asked them what was the matter; they said a number of soldiers had been out with bayonets and cutlasses, and had attacked and cut the people all down Cornhill, and then retreated to the barracks; a fellow said they had been cutting fore and aft; the sentinel at the Custom House steps was loading his piece; coming up to the people, they said the sentinel was going to fire; there were at that time about fifteen or twenty people round him; he was waving his piece about, and held it in the position that they call "charged bayonets"; I told him if he fired he must die for it; he said, "damn them, if they molested him he would fire;" the boys were hallooing "fire, and be damned"; these boys were seventeen or eighteen years old; I endeavored to keep one fellow off from the sentinel, and either struck him or pushed him away; heard one of the persons say, "God damn him, we will knock him down for snapping."

Benjamin Lee. Am an apprentice; on the evening of fifth March heard there was fire, and went to Dock square; when I came there, heard some in the crowd say, that the town's people had been fighting with the soldiers, and then they huzzaed for King street; several beside me went up; they went up as thick as they could, and some went up the next lane, and others up Cornhill; as I stood by the sentinel, there was a barber's boy came up and pointed to the sentinel, and said, "there is the son of a bitch that knocked me down"; on his saying this, the people immediately cried out, "kill him, kill him, knock him down"; the sentinel went up the Custom House steps and knocked at the door with the butt of his gun, but could not get in; then he primed and loaded, and leveled it with his hip, and desired the people to stand off, and then called to the main guard to come down to his assistance; then Captain Preston and nine or ten soldiers came down, and ranged themselves before the sentry box; did not see any thing thrown at the sentinel.

Andrew. Am Oliver Wendell's negro; on the evening of the fifth March was at home; heard the bells ring, and went to the gate, and saw one of my acquaintances; I asked him what was the matter; he said the soldiers were fighting, had got cutlasses, and were killing everybody, and that one of them had struck him on the arm, and almost cut it off; told me I had best not go down; I said a good club was better than a cutless, and he had better go down and see if he could not cut some, too; went to the Town House; saw the sentinels placed at the main guard, standing by Mr. Bowe's corner; numbers of boys on the other side of the way were throwing snowballs at them; the sentinels were enraged and swearing at the boys; the boys called them "lobsters," "bloody backs," and hallooed, "who buys lobsters?" I heard three cheers given in King street, and went down to the whipping-post and stood by Waldo's shop; saw a number of people round the sentinel at the Custom House; there were also a number of people who stood where I did, and were picking up pieces of sea coal that had been thrown out thereabout, and snowballs, and throwing them over at the sentinel; two or three boys ran out from among the people, and cried, "we have got his gun away, and now we will have him"; heard three cheers given by the people at the Custom House; saw a file of men, with an officer with a laced hat on before them; the officer said something to them, and they filed off down the street to the Custom House; as soon as they got there the people gave three cheers; heard somebody huzza and say, "here is old Murray with the riot act," and they began to pelt with snowballs; he turned about and said, "you damned lobster, bloody back, are you going to stab me?" the soldier said, "by God, I will"; somebody took hold of me by the shoulder and told me to go home, or I should be hurt; at the same time there were a number of people towards the Town House, who said, come away and let the guard alone, you have nothing at all to do with them; saw the officer standing before the men, and one or two persons engaged in talk with him; a number were jumping on the backs of those that were talking with the officer, to get as near as they could; a man who was talking with the officer turned about quick to the people, and said, "Damn him, he is going to fire"; upon that they gave a shout, and cried out, "fire and be damned, who cares for you, you dare not fire"; and began to throw snowballs, and other things which then flew very thick; saw two or three of them hit, one struck a grenadier on the hat; as the soldiers were pushing with their guns back and forth, they struck their guns, and one hit a grenadier on the fingers; the people up at the town house called again, "come away, come away"; a stout man stood near me, and right before the grenadiers, as they pushed with their bayonets with the length of their arms, kept striking on their guns; the people seemed to be leaving the soldiers, and to turn from them, when there came down a number from Jackson's corner huz-

saing and crying, "damn them, they dare not fire, we are not afraid of them"; one of these people, a stout man with a long, cord-wood stick, threw himself in, and made a blow at the officer; saw the officer try to ward off the stroke; the stout man turned round, and struck the grenadier's gun at the captain's right hand, and immediately fell in with his club, and knocked his gun away and struck him over the head; the blow came either on the soldier's cheek or hat. This stout man held the bayonet with his left hand and twitched it and cried, "kill the dogs, knock them over"; this was the general cry; the people then crowded in, and upon that, the grenadier gave a twitch back and relieved his gun, and he up with it and began to pay away on the people; I turned to go off, when I heard the word, "fire"; at the word "fire," I thought I heard the report of a gun, and upon my hearing the report, I saw the same grenadier swing his gun, and immediately he discharged it; this stout man that fell in and struck the grenadier, I think was the mulatto who was shot; the grenadier who was assaulted and fired, I then thought was Killroy, and I told Mr. Quincy so the next morning after the affair happened; I now think it was he from my best observation, but can't positively swear to it.

Oliver Wendell. Am a merchant; the witness last examined is my servant; his general character for truth is good; I have heard his testimony, and believe it to be true; he gave the same relation of this matter to me on the same evening, in a quarter of an hour after the affair happened; then asked him whether our people were to blame, and he said they were.

Mr. Quincy. "Pray, sir, is it not usual for Andrew to amplify and embellish a story"? "He is a fellow of a lively imagination, and will sometimes amuse the servants in the kitchen, but I never knew him tell a serious lie."

William Whittington. Was in King street a quarter after nine o'clock on fifth March, and two others with me; in a little while I heard the bells ring; saw several people with buckets; they said there was fire somewhere; I came up by Pudding lane, and went in between the guard and guard house; saw Mr. Basset, the officer, and Captain Preston; while I was standing there, some person in the crowd fronting the soldiers cried out to the guard, "will you stand there and see the sentinel murdered at the custom-house"? Captain Preston and Mr. Basset were both together; Mr. Basset said to Captain Preston, "what shall I do in this case?" Said Preston, "take out six or seven of the men, and let them go down to the assistance of the sentry." They formed themselves by files, the corporal marched in the front, and the Captain in the rear; they formed in a half circle; I was about two or three yards distance from them; heard Captain Preston use many entreaties to the populace, begging they would disperse and go home, but what they said I cannot tell; heard them halloo, "fire!" "fire!" "you dare not fire," "we know you dare not fire."

Harrison Gray, jr. That eve-

ning, upon returning home, saw a number of people round the sentinel, making use of opprobrious language and threatenings; I desired them to go off, and said the consequence would be fatal if they did not; some few snow balls were thrown, and abusive language continued, they said, "damn him, let him fire, he can fire but one gun." There might be from seventy to an hundred; when I could not prevail to get them off, I went to Mr. Payne's. In a little while the party came down, and I saw nothing afterwards; soon after I heard the guns fired, and Mr. Payne was wounded by one of them; told the people, the sentinel was on duty, that was his post, that he had a right to walk there, and that he could have enough to relieve him, if he stood in need of it, as he was so near the main guard.

John Jeffries. Am a surgeon; was Patrick Carr's surgeon, in company with others. After dressing his wounds, I advised him never to go again into quarrels and riots. He said he saw many things thrown at the sentry; he believed they were oyster shells and ice; he heard the people huzza every time they heard any thing strike that sounded hard; he then saw some soldiers going down towards the custom-house; he saw the people pelt them as they went along. After they had got down there, he crossed over towards Warden & Vernon's shop, in order to see what they would do; as he was passing he was shot, and was taken up and carried home to Mr. Field's by some of his friends; asked him whether he thought the soldiers would fire; he told me he thought the soldiers would have fired long before; then asked him whether he thought the soldiers were abused a great deal after they went down there; he said he thought they were. Asked him whether he thought the soldiers would have been hurt if they had not fired; he said he really thought they would, for he heard many voices cry out, "kill them." Asked him then whether he thought they fired in self-defense, or on purpose to destroy the people; he said he really thought they did fire to defend themselves, that he did not blame the man, whoever he was, that shot him. This conversation was on Wednesday. He was informed by me of his dangerous situation. He told me he was a native of Ireland; that he had frequently seen mobs, and soldiers called upon to quell them. Whenever he mentioned that, he always called himself a fool, that he might have known better, that he had seen soldiers often fire on the people in Ireland, but had never in his life seen them bear half so much before they fired. He lived ten days after he received his wound. I had the last conversation with him about 4 o'clock in the afternoon preceding the night on which he died. and he then particularly said, he forgave the man, whoever he was, that shot him; he was satisfied he had no malice, but fired to defend himself.

Edward Payne. Am a merchant. On Monday evening, 5th of March, went to Mr. Amory's; while I was there the bell rang, supposed for 9 o'clock; was going out to inquire where the fire was; Mr. Taylor came in, and

said there was no fire, but he understood the soldiers were coming up to cut down liberty tree! then went out to make inquiry; before I had got into King street, met Mr. Walker the ship carpenter, and asked him what the matter was; he said the soldiers had sallied out from Smith's barracks, and had fallen on the inhabitants, and had cut and wounded a number of them, but that they were driven into the barracks; then went to my house to inform Mrs. Payne that it was not fire, apprehending she might be frightened; immediately went out again, there was nobody in the street at all; the sentry at the custom-house was walking as usual, nobody near him; went up towards the town house, where was a number of people and inquired of them what the matter was? They gave me the same account that Mr. Walker did. While I stood there, heard a noise in Cornhill, and presently heard a noise of some people coming up Silsby's alley; at first I imagined it was soldiers, and had some thoughts of retiring up the town house steps, but soon found they were inhabitants. Stood till they came up to me; I believe there might be twenty at the extent; some of the persons had sticks, some had not; believe there were as many with sticks as without; they made a considerable noise, and cried, "where are they? where are they?" There came up a barber's boy, and said the sentry at the custom-house had knocked down a boy belonging to their shop; the people then turned about and went down to the sentry; I was then left as it were alone; I proceeded towards my own house; met Mr. Spear, the cooper, he said, "do not go away, I am afraid the main guard will come down;" told him I was more afraid of those people that had surrounded the sentry, and desired him, if he had any influence over them, to endeavor to take them off; when directly opposite to the custom-house saw a number of persons going up the steps, and heard a violent knocking at the door; the sentry stood by the box; then retired to my own house, and stood on the sill of my door; remained at my door, and Mr. Harrison Gray came up and stood there talking with me; the people were crying out, "fire! fire! damn you, why do you not fire?" Mr. Gray and I were talking of the foolishness of the people in calling the sentry to fire on them; in about a minute saw a number of soldiers come down from the main guard, and it appeared to me they had their muskets in a horizontal posture; they went towards the custom-house, and shoved the people from the house; at this time Mr. Bethune joined us on my steps at the door, and the noise in the street continued much the same as before, "fire! fire! damn you, fire! why do you not fire?" Soon after this, I thought I heard a gun snap, and said to Mr. Gray, there is a gun snapped, did you not hear it? He said "yes;" immediately a gun went off, I reached to see whether it was loaded with powder, or any body lying dead; heard three more, then there was a pause, and I heard the iron rammers go into their guns, and then there were three more discharged, one after another; it

appeared to me there were seven in all. When the last gun was discharged I realized I was myself wounded and went into the house.

December 1.

Joseph Hinckley. On the evening of 5th of March heard the bells ring, went out in order to see where the fire was, heard the drum beat, and went down to the Conduit; saw thirty or forty people with sticks in their hands. Then they hallooed, King street forever, and huzzaed. The sentinel walking backwards and forwards with his firelock on his shoulder; some of the people said, kill him; saw Gray who was killed; he said to me don't run, my lad, they dare not fire.

Charles Willis. I saw nothing worth relating; was not in King street; saw a number of people but was not near enough to see much.

Matthew Murray. That evening was at home, and heard the bells ring, and went into the street and was told it was not fire, but the soldiers fighting with the inhabitants; went into the house and could find no stick, but cut the handle of my mother's broom off, with this I came to King street, but there were no soldiers; some people were coming from Royal Exchange lane, some from the Town house, some said, damn it they are only making fools of us, it is best to go home; went to the head of Royal Exchange lane, and saw a cluster of people there, saw a boy who said that the sentry had knocked him down with the butt end of his gun; saw the sentry on the steps and the people after he loaded, said "fire! damn you, fire!" After the party came down, I stood close to them, they were swinging their bayonets, telling the people to make way; the grenadier on the right was struck somewhere on his right side, but I do not know with what, but directly he fired.

Thomas Symmonds. Betwixt 8 and 9 o'clock of 5th of March near Murray's barracks, the people were running backwards and forwards, and there was a great mob and riot by the barrack gate; heard the people as they went along declare, if the soldiers did not come out and fight them, they would set fire to the four corners of the barracks, and burn every damned soul of them. I saw a good number of town's people had cutlasses, clubs and swords, there was knocking down, riot and disturbance, and this declaration of theirs was after that, and before the bells rung.

William Parker. On the evening of 5th of March saw seven or eight people, the chief were boys, three or four of them were on the inside the rails, pulling the butcher's stalls to pieces; a soldier passed by; they said here is a damned soldier; some said they are all alike, this is as bad as any of them. I believe they would have beat him if I had not rescued him; he was passing quietly along.

John Gridley. On the evening of 5th of March, betwixt the hours of 9 and 10, we were alarmed with the bells and a cry of fire. I stopped just before the sentinel placed at the custom-house, there were a large number of boys, and some men amongst them, about ten young men, the

boys were in the front, and the men in the rear; several people were running about the streets, and the cry was damn the rascals. Some said this will never do, the readiest way to get rid of these people is to attack the main guard. Strike at the root, there is the nest.

Mrs. Catherine Field. Patrick Carr, who was killed by the firing in King street on the 5th was in my house that evening; when the bells rung he went upstairs and put his surtout on, and got a hanger and put it betwixt his coat and surtout; my husband coming at that time, gave him a push and felt the sword; he wanted to take it from him, but he was unwilling to let it go, my husband told him he should not take it with him; do not know what he said, but one of the neighbors was in the house and coaxed the sword out of his hand, and he went out without it. He said on his death bed, he saw a parcel of boys and negroes throwing snow balls at the guard. He thought the first or second man from the sentinel box was the man that shot him.

John Mansfield. Know Patrick Carr; on the night the bells rung he would go out, I persuaded him much to stay at home, he did not mind me but took his sword betwixt his coat and surtout. Mr. Field coming in felt it, and said he should not take it out with him; with much coaxing a woman who lived next door got it from him. I was often at his bedside, and all that I ever heard him say was, he thought he knew the man that shot him, but he never made it known to me.

John Stewart. Between 8 and 9 o'clock, on 5th of March, as I was going home to Green's lane, met five or six men with sticks in their hands, about the middle of it I met much the same number, and at the end of it about as many more. They were going into town towards King street.

Capt. Barbason O'Hara. Know Carrol, one of the prisoners; I landed at a battery where he was on duty, and entered into conversation with him; and I have taken particular notice of him ever since; his general character is that of a discreet, sober, orderly man.

Theodore Bliss. On the evening of 5th of March I went out of the house and came into King street; there saw the soldiers and the officer; went to the officer and asked him if his men were loaded, he said they were; asked him if they loaded with ball, he made me no answer; asked him if they were going to fire, he said they could not fire without his orders; directly I saw a snow ball and stick come from behind me which struck the grenadier on the right, which I took to be Warren, he warded it off with his musket as well as he could, and immediately he fired. He was the first man on the right, and the third man from the officer; immediately after the first gun, the officer turned to the right and I turned to the left and went down the lane; heard the word fire given, but whether it was the town's people or the officer I do not know.

THE SPEECHES FOR THE PRISONERS

December 3.

Mr. Josiah Quincy, Jr. May it please your Honors, and you, Gentlemen of the Jury: We have at length gone through the evidence in behalf of the prisoners. The witnesses have placed before you that state of facts from which results our defense. The examination has been so lengthy, that I am afraid some painful sensations arise, when you find that you are now to sit and hear the remarks of counsel. But you should reflect, that no more indulgence is shown to the prisoners now on trial, than has ever been shown in all capital causes; the trial of one man has often taken up several days. When you consider, therefore, that there are eight lives in issue, the importance of the trial will show the necessity of its length. To each of the prisoners different evidence applies, and they each of them draw their defense from different quarters.

In my former remarks upon opening this case to you, gentlemen, I pointed out the dangers to which you were exposed. How much need was there for my desire, that you should suspend your judgment till the witnesses were all examined! How different is the complexion of the cause! Will not all this serve to show every honest man the little truth to be attained in partial hearings? We have often seen communities complain of *ex parte* testimonies; individuals, as well as societies of men, are equally susceptible of injuries of this kind. This trial ought to have another effect; it should serve to convince us all of the impropriety, nay, injustice of giving a latitude in conversation upon topics likely to come under a judicial decision; the criminality of this conduct is certainly enhanced, when such loose sallies and discourses are so prevalent as to be likely to touch the life of a citizen. Moreover, there is so little certainty to be obtained by such kind of methods, that I wonder we so often find them practiced. In the present case, how great was the prepossession against us! And I appeal to you, gentlemen, what cause

there now is to alter our sentiments. Will any sober, prudent man countenance the proceedings of the people in King street? Can any one justify their conduct? Is there any one man, or any body of men, who are interested to espouse and support their conduct? Surely not. But our inquiry must be confined to the legality of their conduct; and here can be no difficulty. It was certainly illegal, unless many witnesses are directly perjured; witnesses, who have no apparent interest to falsify—witnesses, who have given their testimony with candor and accuracy—witnesses, whose credibility stands untouched—whose credibility the counsel for the king do not pretend to impeach, or hint a suggestion to their disadvantage.

The conduct of the soldiers in Cornhill may well be supposed to have exasperated the minds of all who beheld their behavior. Their actions accumulated guilt, as it flew; at least, we may well suppose, the incensed people who related them added new colors to the scene. The flame of resentment imperceptibly enkindles, and a common acquaintance with human nature will show it to be no extravagant supposition to imagine that many a moderate man might at such a season, with such sentiments, which I have more than once noticed, hearing such relations and complaints—I say, do I injure any one, in supposing, that under all these circumstances, a very moderate person, who in ordinary matters acted with singular discretion, should now be drawn imperceptibly away or rather transported into measures, which in a future moment he would condemn and lament. What more natural supposition, than to suppose many an honest mind might at this time fluctuate thus. The soldiers are here; we wish them away; we did not send for them; they have cut and wounded the peaceable inhabitants, and it may be my turn next. At this instant of time, he has a fresh detail of injuries—resentment redoubles every successive moment—huzza for the main guard! we are in a moment before the custom-house. No time is given for recollection. We find, from the king's evidence, and from our own, the cry was, "Here is a

soldier!" Not "here is *the* soldier who has injured us—here is the fellow who wounded the man in Cornhill." No, the reasoning or rather ferment seems to be, the soldiers have committed an outrage, we have an equal right to inflict punishment, or rather revenge, which they had to make an assault. They said right, but never considered, that those soldiers had no right at all. These are sentiments natural enough to persons in this state of mind—we can easily suppose even good men thinking and acting thus. Very similar to this is the force of Dr. Hiron's testimony, and some others. But our inquiry is, what says the law? We must calmly inquire, whether this, or any thing like it, is countenanced by the law. What is natural to the man, what are his feelings, are one thing; what is the duty of the citizen, is quite another. Reason must resume her seat, and then we shall hear and obey the voice of the law.

The law indulges no man in being his own avenger. Early, in the history of jurisprudence, we find the sword taken from the party injured, and put into the hands of the magistrate. Were not this the case, punishment would know no bounds in extent or duration. Besides, it saps the very root of distributive justice, when any individual invades the prerogative of law, and snatches from the civil magistrate the balance and the rod. How much more are the pillars of security shaken, when a mixt body, assembled as those in King street, assume the province of justice, and invade the rights of the citizen? For it must not be forgotten that the soldier is a citizen, equally entitled with us all to protection and security. Hence all are alike obliged to pay obedience to the law; for the price of this protection is the duty of obedience.

Let it not be apprehended, that I am advancing a doctrine, that a soldier may attack an inhabitant, and he not be allowed to defend himself. No, gentlemen! if a soldier rush violently through the street, and present a weapon of death in a striking posture, no doubt the person assailed may defend himself, even to taking the life of the assailant. Revenge and a sense of self-preservation instantly take posses-

sion of the person thus attacked; and the law goes not upon the absurd supposition, that a person can in these circumstances unman himself. Hence we find, if a husband, taking his wife in the act of adultery, instantly seizes a deadly weapon and slays the adulterer, it is not murder. Nay, a fillip upon the nose or forehead, in anger, is supposed by the law to be sufficient provocation to reduce killing to manslaughter. It is, therefore, upon principles like these, principles, upon which those, who now bear the hardest against us, at other times, so much depend; it is, I say, upon the right of self-defense and self-preservation we rely for our acquittal.

Here again it should be kept in view, that whenever the party injuring has escaped by flight, and time sufficient for the passions to cool, in judgment of law, hath elapsed, however great the injury, the injured party must have recourse to law for his redress. Such is the wisdom of the law; of that law, than which we are none of us to presume ourselves wiser; of that law, which is founded in the experience of ages, and which in condescension to the infirmities of flesh and blood (but to nothing else) extenuates the offense. For "no man," says the learned Judge Foster, "under protection of the law, is to be the avenger of his own wrongs. If they are of such a nature for which the laws of society will give him an adequate remedy, thither he ought to resort. But be they of what nature soever, he ought to bear his lot with patience, and remember, that vengeance belongeth to the Most High."

Now, gentlemen, those, whoever they were, who committed the outrage in Cornhill, had absconded—the soldiers, who are supposed to have done them, were confined in their barracks. People were repeatedly told this, and assured by the military officers, that they should not go unpunished. But what followed? Are all present appeased? We are constrained by the force of the evidence to affirm they were not. But to get regular and right ideas, we must consider all the commotions of the season, and endeavor to come at

truth by analyzing the evidence, and arranging it under distinct heads of enquiry.[1]

Gentlemen of the Jury, after having thus gone through the evidence, and considered it as applicatory to all and every of the prisoners, the next matter in order seems to be the consideration of the law pertinent upon this evidence.

[1] *Mr. Quincy* now entered, at large, upon a review of the appearances in several parts of the town; he was copious upon the expressions and behavior sworn to. He then, more particularly recapitulated the evidence touching Murray's barracks, Dock square, and the Market place. He next pursued several parties, through the several lanes and streets, till they centered at the scene of action.

The testimonies of the witnesses, who swore to the repeated information given the people; that the sentry and party were on duty; that they were desired to withdraw and warned of the consequences; were in their order considered.

Under the next three heads, was remarked "the temper of the sentry, of the party of soldiers, and of the people surrounding them."

The words, insult and gestures of the same persons were pointed out; and from thence was collected the designs of the persons assaulting, and the reasonable apprehensions of those assaulted.

Mr. Quincy then came to the attack itself—considering who the persons were (namely, some sailors), remarking minutely the words and actions immediately preceding the onset; the weapons used; the violence of the assault and battery; and the danger of the soldiers.

Mr. Quincy next exhibited those parts of the testimony, which evidenced the attack continued after the firing.

Under all these heads, there was methodically stated the number of the witnesses to each point, and by a comparative view of all the proofs, conclusions drawn as the force of the whole.

The next consideration, in this mode of inquiry, was the evidence as severally pertaining to each prisoner; with such observations, on the one hand, as served to show a defect of legal proof as to fact; on the other, such matter as served to justify, excuse or extenuate the offense, in law.

And particularly with regard to Killroy, *Mr. Quincy* cited and commented on the following passages from Judge Foster's crown law, and the Marquis of Beccaria's Essay on Crimes and punishments: "Words are often misrepresented, whether through ignorance, inattention, or malice, it mattereth not the defendant, he is equally affected in either case; and they are equally liable to misconstruction. And withal, this evidence is not in the ordinary course of things to be disproved by that sort of negative evidence by whch the proof of plain facts may be and often is confronted." Crown Law, 243. "Finally, the credibility of a witness is null, when the question relates to the words of a criminal; for the tone of voice, the gesture, all that precedes, accompanies and follows the different ideas which men annex

And here, gentlemen, let me again inform you, that the law which is to pass upon these prisoners, is a law adapting itself to the human species, with all their feelings, passions, and infirmities; a law which does not go upon the absurd supposition, that men are stocks and stones; or that in the fervor of the blood, a man can act with the deliberation and judgment of a philosopher. No, gentlemen; the law supposes that a principle of resentment, for wise and obvious reasons, is deeply implanted in the human heart; and not to be eradicated by the efforts of state policy. It, therefore, in some degree, conforms itself to all the workings of the passions, to which it pays a great indulgence, so far as not to be wholly incompatible with the wisdom, good order, and the very being of government.

Keeping, therefore, this full in view, let us take once more, a very brief and cursory survey of the matters supported by the evidence. And, here, let me ask sober reason—what language more opprobrious—what actions more exasperating, than those used on this occasion? Words, I am sensible, are no justification of blows, but they serve as the grand clues to discover the temper and the designs of the agents; they serve also to give us light in discerning the apprehensions and thoughts of those who are the objects of abuse.

"You lobster," "you bloody back," "you coward," and "you dastard," are but some of the expressions proved. What words more galling? What more cutting and provoking to a soldier? To be reminded of the color of his garb, by which he was distinguished from the rest of his fellow citizens; to be compared to the most despicable animal that

to the same words, may so alter and modify a man's discourse, that it is almost impossible to repeat them precisely in the manner in which they were spoken. Besides, violent and uncommon actions, such as real crimes, leave a trace in the multitude of circumstances that attend them, and in their efforts; but words remain only in the memory of the hearers, who are commonly negligent or prejudiced. It is infinitely easier then to sound an accusation on the words, than on the actions of a man; for in these, the number of circumstances, urged against the accused, afford him variety of means of justification." Essay, 48, 9.

crawls upon the earth, was touching indeed a tender point. To be stigmatized with having smarted under the lash at the halbert; to be twitted with so infamous an ignominy, which was either wholly undeserved, or a grievance which should never have been repeated; I say, to call upon and awaken sensations of this kind, must sting even to madness. But accouple these words with the succeeding actions—"You dastard—you coward!" A soldier and a coward! This was touching (with a witness) "the point of honor, and the pride of virtue." But while these are as yet fomenting the passions, and swelling the bosom, the attack is made; and probably the latter words were reiterated at the onset; at least, were yet sounding in the ear. Gentlemen of the jury, for heaven's sake, let us put ourselves in the same situation! Would you not spurn at that spiritless institution of society, which should tell you to be a subject at the expense of your manhood?

But does the soldier step out of his ranks to seek his revenge? Not a witness pretends it. Did the people come within the points of their bayonets, and strike on the muzzles of the guns? You have heard the witnesses.

Does the law allow one member of the community to behave in this manner towards his fellow citizen, and then bid the injured party be calm and moderate? The expressions from one party were—"Stand off—stand off!" "I am upon my station." "If they molest me upon my post, I will fire." "By God I will fire!" "Keep off!" These were words likely to produce reflection and procure peace. But had the words on the other hand a similar tendency? Consider the temper prevalent among all parties at this time. Consider the then situation of the soldiery; and come to the heat and pressure of the action. The materials are laid, the spark is raised, the fire enkindles, the flame rages, the understanding is in wild disorder, all prudence and true wisdom are utterly consumed. Does common sense, does the law, expect impossibilities? Here, to expect equanimity of temper, would be as irrational, as to expect discretion in a mad man. But was

any thing done on the part of the assailants, similar to the conduct, warnings, and declarations of the prisoners? Answer for yourselves, gentlemen. The words, reiterated all around, stabbed to the heart; the actions of the assailants tended to a worse end; to awaken every passion of which the human breast is susceptible. Fear, anger, pride, resentment, revenge, alternately, take possession of the whole man. To expect, under these circumstances, that such words would assuage the tempest, that such actions would allay the flames—you might, as rationally, expect the inundations of a torrent would suppress a deluge, or rather, that the flames of Etna would extinguish a conflagration!

Prepare, gentlemen of the jury, now to attend to that species of law, which will adapt itself to this trial, with all its singular and aggravating circumstances; a law full of benignity, full of compassion, replete with mercy.

And here, gentlemen, I must, agreeable to the method we formerly adopted, first tell you by what law the prisoners are not to be tried, or condemned. And they most certainly are not to be tried by the Mosaic law; a law, we take it, peculiarly designated for the government of a peculiar nation, who being in a great measure under a theocratical form of government, its institutions cannot, with any propriety, be adduced for our regulation in these days. It is with pain, therefore, I have observed any endeavor to mislead our judgment on this occasion, by drawing our attention to the precepts delivered in the days of Moses; and by disconnected passages of Scriptures, applied in a manner foreign to their original design or import, there seems to have been an attempt to touch some peculiar sentiments, which we know are thought to be prevalent; and in this way, we take it, an injury is like to be done by giving the mind a bias, it ought never to have received; because it is not warranted by our laws.

We have heard it publicly said of late, oftener than formerly, "Whosoever sheddeth man's blood, by man shall his blood be shed." This is plainly, gentlemen, a general rule, which, like all others of the kind, must have its exception. A

rule which, if taken in its strict literal latitude, would imply that a man killing another in self-defense, would incur the pains of death. A doctrine which no man in his senses would ever embrace; a doctrine that certainly never prevailed under the Mosaical institution. For we find the Jews had their six cities of refuge to which the manslayer might flee from the avenger of blood. And something analogous to this (if it did not originate from it) is our benefit of clergy.

And so, that, "the murderer shall flee to the pit" comes under the same consideration. And when we hear it asked, as it very lately has been, "Who dare stay him?" I answer, if the laws of our country stay him, you ought to do likewise; and every good subject dares to do what the law allows. But the very position is begging the question; for the question now in issue is whether either of the prisoners is a murderer, in the sense of our laws; for you recollect that what is murder and what not, is a question of law arising upon facts stated and allowed.

But go on; "You shall take no satisfaction for the life of a murderer which is guilty of death." Here again is a begging the question; and moreover the words "guilty of death," if rightly rendered from the original, must be one of those general rules I just now mentioned; which always have their exceptions. But those words seem to be wrongly translated: for in the margin of our great bible we find them rendered "faulty to die." Against a position of this kind we have no objection. If we have committed a fault, on which our laws inflict the punishment of death, we must suffer. But what fault we have committed you are to inquire: or rather you, gentlemen, are to find that the facts proved in court against us, and the judges are to see and consider what the law pronounces touching our offense, and what punishment is thereby inflicted as a penalty.

In order to come at the whole law resulting from the facts which have been proved, we must inquire into the legality of the assemblies. For such is the wisdom and policy of the law, that if any assembly be lawful, each individual of that

assembly is answerable only for his own act, and not for any other. On the contrary, if an assembly be unlawful, the act of any one of the company, to the particular purpose of assembling, is chargeable on all. This is law, which no lawyer will dispute; it is a law founded in the security of the peace of society, and however little considered, by people in general, it ought now steadily to be kept in mind.

Was the assembly of the soldiers lawful?—For what did the soldiers assemble? Was the sentinel insulted and attacked? Did he call for assistance, and did the party go to assist him? Was it lawful for them so to do? Was the soldiers when thus lawfully assembled, assaulted, etc., by a great number of people assembled, etc. Was this last assembly lawful? Was any thing done by this unlawful assembly, that will, in law, justify, excuse, or extenuate the offense of killing, so as to reduce it to manslaughter? Was the killing justifiable, or rather was it justifiable self-defense? Was it excusable, or rather was it self-defense, culpable, but, through the benignity of the law, excusable? or was it felonious? if felonious, was it with or without malice?[2]

[2] The law laid down, in Foster, 261, 2, being indisputable law, not denied or controverted! and being very material in the trial, and much relied on by the prisoners, is here set down at large: "I will mention a case (says the learned Judge), which through the ignorance or lenity of juries hath been sometimes brought within the rule of accidental death. It is where a blow aimed at one person lighteth on another and killeth him. This, in a loose way of speaking, may be called accidental with regard to the person who dieth by a blow not intended against him. But the law considereth this case in a quite different light. If from circumstances it appeareth that the injury intended to A, be it by poison, blow, or any other means of death, would have amounted to murder supposing him to have been killed by it, it will amount to the same offense if B happeneth to fall by the same means. Our books say, that in this case the malice *egreditur personam*. But to speak more intelligibly, where the injury intended against A proceeded from a wicked, murderous, or mischievous motive, the party is answerable for all the consequences of the action, if death ensues from it, though it had not its effect upon the person whom he intended to destroy. The *malitia* I have already explained, the heart regardless of social duty deliberately bent upon mischief, consequently the guilt of the party is just the same in the one case as the other. On the other hand, if the blow

I have gone through those authorities in law, which I thought pertinent to this trial. I have been thus lengthy, not for the information of the Court, but to satisfy you, gentlemen, and all who may chance to hear me, of that law, which is well known to those of us who are conversant in courts, but not so generally known or attended to by many, as it ought to be. A law which extends to each of us, as well as to any of the prisoners; for it knows no distinction of persons.

And the doctrines which have been thus laid down are for the safeguard of us all. Doctrines which are founded in the wisdom and policy of ages; which the greatest men who ever lived have adopted and contended for. Nay, the matter has been carried by very wise men much further than we have contested for. And that you may not think the purport of the authorities read are the rigid notions of a dry system, and the contracted decisions of municipal law, I beg leave to read to you a passage from a very great theoretic writer: a man whose praises have resounded through all the known world and probably will through all ages; whose sentiments are as free as air, and who has done as much for learning, liberty and mankind as any of the sons of Adam; I mean the sagacious Mr. Locke: He will tell you, gentlemen, in his Essay on Government, page 2, chapter 3, "That all manner of force without right puts man in a state of war with the aggressor; and of consequence, that, being in such a state of war, he may lawfully kill him who puts him under this unnatural restraint." According to this doctrine, we should have nothing to do but inquire whether here was "force without right": if so, we were in such a state as rendered it lawful to kill the aggressor, who "put us under so unnatural a restraint." Few, I believe, will say, after hearing all this evidence, that we were under no unnatural restraint. But

intended against A, and lighting on B, arose from a sudden transport of passion which in case A had died by it, would have been reduced to manslaughter, the fact will admit of the same alleviation if B should happen to fall by it." To the same effect are other authorities.

we do not wish to extend matters so far. We cite this author to show the world that the greatest friends to their country, to universal liberty, and the immutable rights of all men have held tenets and advanced maxims favorable to the prisoners at the bar. And although we should not adopt the sentiments of Mr. Locke in their most extensive latitude, yet there seems to be something very analogous to this opinion, which is countenanced in our laws.

There is a spirit which pervades the whole system of English jurisprudence which inspires a freedom of thought, speech and behavior. Under a form of government like ours it would be in vain to expect that pacific, timid, obsequious, and servile temper, so predominant in more despotic governments. From our happy constitution there results its very natural effects—an impatience of injuries and a strong resentment of insults (and a very wise man has said, "He who tamely beareth insults inviteth injuries."): Hence, I take it that attention to the "feelings of humanity"—to "humanity and imperfection"—"the infirmities of flesh and blood;" that attention to "the indellible rights of mankind"—that lenity to "the passions of man";—that "benignity and condescension of the law" so often repeated in our books. And, indeed, if this were not the case the genius of our civil constitution and the spirit of our municipal law would be repugnant—that prime defect in any political system—that grand solecism in state policy.

Gentlemen of the Jury: This case has taken up much of your time, and is likely to take so much more, that I must hasten to a close; indeed, I should not have troubled you, by being thus lengthy, but from a sense of duty to the prisoners, who, in some sense, may be said to have put their lives into my hands; whose situation is so peculiar, that we have necessarily taken up more time than ordinary cases would require; who, under all these circumstances, placed a confidence, which it was my duty not to disappoint; and which I have aimed at discharging with fidelity. I trust that you, gentlemen, will do the like; that you will examine and

judge with a becoming temper of mind; remembering that they, who are under oath to declare the whole truth, think and act very differently from bystanders, who, being under no ties of this kind, take a latitude which is by no means admissible in a court of law.

I cannot better close this cause, than by desiring you to consider well the genius and spirit of the law which will be laid down, and to govern yourselves by this great standard of truth. To some purposes, you may be said, gentlemen, to be ministers of justice; and "ministers," says a learned judge, "appointed for the ends of public justice, should have written on their hearts the solemn engagements of his majesty, at his coronation, to cause law and justice in mercy to be executed in all his judgments."

> "The quality of mercy is not strained;
> It droppeth like the gentle rain from heaven ——
> ——— It is twice blessed;
> It blesses him that gives, and him that takes."

I leave you, gentlemen, hoping you will be directed in your inquiry and judgment to a right discharge of your duty. We shall all of us, gentlemen, have an hour of cool reflection, when the feelings and agitations of the day shall have subsided; when we shall view things through a different and a much juster medium. It is then that we all wish an absolving conscience. May you, gentlemen, now act such a part, as will hereafter insure it; such a part as may occasion the prisoners to rejoice. May the blessing of those, who were in jeopardy of life, come upon you; may the blessing of him, who is not faulty to die, descend and rest upon you and your posterity.

Mr. Adams. May it please your Honor, and you, Gentlemen of the Jury: I am for the prisoners at the bar, and shall apologize for it only in the words of the Marquis Beccaria: "If I can but be the instrument of preserving one life, his blessing and tears of transport shall be a sufficient consolation to me, for the contempt of all mankind." As the prisoners stand before you for their lives, it may be proper

to recollect with what temper the law requires we should proceed to this trial. The form of proceeding at their arraignment has discovered, that the spirit of the law upon such occasions, is conformable to humanity, to common sense and feeling; that it is all benignity and candor. And the trial commences with the prayer of the court, expressed by the clerk, to the supreme judge of judges, empires, and worlds: "God send you a good deliverance."

We find, in the rules laid down by the greatest English judges, who have been the brightest of mankind, that we are to look upon it as more beneficial, that many guilty persons should escape unpunished, than that one innocent person should suffer. The reason is, because it is of more importance to the community, that innocence should be protected, than it is, that guilt should be punished; for guilt and crimes are so frequent in the world, that all of them cannot be punished; and many times they happen in such a manner, that it is not of much consequence to the public, whether they are punished or not. But when innocence itself is brought to the bar and condemned, especially to die, the subject will exclaim, it is immaterial to me whether I behave well or ill, for virtue itself is no security. And if such a sentiment as this should take place in the mind of the subject, there would be an end to all security whatsoever. I will read the words of the law itself.

The rules I shall produce to you are from Lord Chief Justice Hale, whose character as a lawyer, as a man of learning and philosophy, and as a christian, will be disputed by nobody living; one of the greatest and best characters the English nation ever produced, his words are these: *Tutius semper est errare in acquietando, quam in puniendo, ex parte misericordiae, quam ex parte justitiae;* it is always safer to err in acquitting than punishing, on the part of mercy than the part of justice. The next is from the same authority: *Tutius erratur ex parte mitiori;* it is always safer to err on the milder side, the side of mercy; the best rule in doubtful cases, is, rather to incline to acquittal than convic-

tion. *Quod dubitas ne feceris;* where you are doubtful never act; that is, if you doubt of the prisoner's guilt, never declare him guilty; this is always the rule, especially in cases of life. Another rule from the same author is, that in some cases presumptive evidence goes so far as to prove a person guilty, though there is no express proof of the fact to have been committed by him; but then it must be very warily pressed, for it is better five guilty persons should escape unpunished, than that one innocent person should die.

The next authority shall be from another judge, of equal character, considering the age wherein he lived; that is Chancellor Fortescue, writing in praise of the laws of England. This is a very ancient writer on the English law. His words are: "Indeed, one would rather, much rather, that twenty guilty persons escape the punishment of death, than one innocent person be condemned, and suffer capitally." Lord Chief Justice Hale says, it is better that five guilty persons escape, than one innocent person suffer. Lord Chancellor Fortescue, you see, carries the matter farther, and says, indeed one had rather, much rather, that twenty guilty persons should escape, than one innocent person suffer capitally. Indeed, this rule is not peculiar to the English law; there never was a system of laws in the world, in which this rule did not prevail; it prevailed in the ancient Roman law, and, which is more remarkable, it prevails in the modern Roman law; even the judges in the courts of inquisition, who, with racks, burnings and scourges, examine criminals, even there, they preserve it as a maxim, that it is better the guilty should escape punishment than the innocent suffer: *Satius esse nocentem absolvi quam insentem damnari.* This is the temper we ought to set out with, and these the rules we are to be governed by. And I shall take it for granted, as a first principle, that the eight prisoners at the bar had better be all acquitted, though we should admit them all to be guilty, than that any one of them should by your verdict be found guilty, being innocent.

I shall now consider the several divisions of law, under which the evidence will arrange itself.

The act now before you is homicide, that is, the killing of one man by another; the law calls it homicide, but it is not criminal in all cases for one man to slay another. Had the prisoners been on the plains of Abraham, and slain an hundred Frenchmen apiece, the English law would have considered it as a commendable action, virtuous and praiseworthy; so that every instance of killing a man is not a crime in the eye of the law.

The law divides homicide into three branches; the first is justifiable, the second excusable, and the third felonious. Felonious homicide is subdivided into two branches: the first is murder, which is killing with malice aforethought, the second is manslaughter, which is killing a man on a sudden provocation. Here, gentlemen, are four sorts of homicide, and you are to consider, whether all the evidence amounts to the first, second, third, or fourth, of these heads. The fact, was the slaying of five unhappy persons that night; you are to consider, whether it was justifiable, excusable, or felonious; and, if felonious, whether it was murder or manslaughter. One of these four it must be; you need not divide your attention to any more particulars. I shall, however, before I come to the evidence, show you several authorities which will assist you and me in contemplating the evidence before us.

I shall begin with justifiable homicide. If an officer, a sheriff, execute a man on the gallows, draws and quarters him, as in case of high treason, and cuts off his head, this is justifiable homicide; it is his duty. So, also, gentlemen, the law has planted fences and barriers around every individual; it is a castle round every man's person, as well as his house. As the love of God and our neighbor comprehends the whole duty of man, so self-love and social comprehend all the duties we owe to mankind, and the first branch is self-love, which is not only our indisputable right, but our clearest duty; by the laws of nature, this is interwoven in the heart of every individual; God Almighty, whose laws we cannot alter, has

implanted it there, and we can annihilate ourselves, as easily as root out this affection for ourselves. It is the first and strongest principle in our nature; Blackstone calls it "the primary canon in the law of nature." That precept of our holy religion, which commands us to love our neighbor as ourselves, doth not command us to love our neighbor better than ourselves, or so well; no christian divine hath given this interpretation. The precept enjoins, that our benevolence to our fellow men should be as real and sincere as our affections to ourselves, not that it should be as great in degree. A man is authorized, therefore, by common sense, and the laws of England, as well as those of nature, to love himself better than his fellow subject; if two persons are cast away at sea, and get on a plank (a case put by Sir Francis Bacon), and the plank is insufficient to hold them both, the one hath a right to push the other off to save himself. The rules of the common law, therefore, which authorize a man to preserve his own life at the expense of another's are not contradicted by any divine or moral law. We talk of liberty and property, but, if we cut up the law of self-defense, we cut up the foundation of both, and if we give up this, the rest is of very little value; and, therefore, this principle must be strictly attended to, for whatsoever the law pronounces in the case of these eight soldiers will be the law to other persons and after ages. It would have been better if all the persons that have slain mankind in this country, from the beginning to this day, had been acquitted, than that a wrong rule and precedent should be established.

I shall now read to you a few authorities on this subject of self-defense. Foster, in his Crown Law, says, in the case of justifiable self-defense, the injured party may repel force with force, in defense of his person, habitation, or property, against one who manifestly intendeth and endeavoreth, with violence or surprise, to commit a known felony upon either. In these cases, he is not obliged to retreat, but may pursue his adversary, till he findeth himself out of danger, and if in a conflict between them he happeneth to kill, such killing

is justifiable. The injured person may repel force by force against any who endeavor to commit any kind of felony on him or his; here the rule is, I have a right to stand on my own defense, if you intend to commit felony. If any of the persons made an attack on these soldiers, with an intention to rob them, if it was but to take their hats feloniously, they had a right to kill them on the spot, and had no business to retreat; if a robber meets me in the street, and commands me to surrender my purse, I have a right to kill him without asking questions; if a person commits a bare assault on me, this will not justify killing; but if he assaults me in such a manner as to discover an intention to kill me, I have a right to destroy him, that I may put it out of his power to kill me. In the case you will have to consider, I do not know that there was any attempt to steal from these persons; however, there were some persons concerned, who would probably enough have stolen, if there had been anything to steal; and many were there who had no such disposition; but this is not the point we aim at, the question is, are you satisfied that the people made the attack in order to kill the soldiers? If you are satisfied that the people, whoever they were, made that assault, with a design to kill or maim the soldiers, this was such an assault, as will justify the soldiers killing in their own defense.

Further, it seems to me we may make another question, whether you are satisfied that their real intention was to kill or maim or not. If any reasonable man, in the situation of one of these soldiers, would have had reason to believe in the time of it, that the people came with an intention to kill him, whether you have this satisfaction now, or not, in your own minds, they were justifiable, or at least excusable, in firing. You and I may be suspicious, that the people who made this assault on the soldiers, did it to put them to flight, on purpose that they might go exulting about the town afterwards in triumph; but this will not do, you must place yourselves in the situation of Wemms or Killroy, consider yourselves as knowing that the prejudices of the world about you

were against you; that the people about you, thought you came to dragoon them into obedience to statutes, instructions, mandates and edicts, which they thoroughly detested; that many of these people were thoughtless and inconsiderate, old and young, sailors and landmen, negroes and mulattos; that the soldiers had no friends about them, the rest were in opposition to them; with all the bells ringing, to call the town together to assist the people in King street, for they knew by that time, that there was no fire; the people shouting, huzzaing, and making the mob whistle, as they call it, which, when a boy makes it in the street, is no formidable thing, but when made by a multitude, is a most hideous shriek, almost as terrible as an Indian's yell; the people crying, "kill them," "knock them over!" heaving snow balls, oyster shells, clubs, white birch sticks three inches and an half in diameter. Consider yourselves in this situation, and then judge whether a reasonable man in the soldiers' situation, would not have concluded they were going to kill him. I believe, if I were to reverse the scene, I should bring it home to our own bosoms; suppose Colonel Marshall, when he came out of his own door, and saw these grenadiers coming down with swords, had thought it proper to have appointed a military watch; suppose he had assembled Gray and Attucks that were killed, or any other persons in town, and had planted them in that station as a military watch, and there had come from Murray's barracks thirty or forty soldiers, with no other arms than snow balls, cakes of ice, oyster shells, cinders and clubs, and attacked this military watch in this manner, what do you suppose would have been the feelings and reasonings of any of our householders? I confess I believe they would not have borne the one-half of what the witnesses have sworn the soldiers bore, till they had shot down as many as were necessary to intimidate and disperse the rest; because, the law does not oblige us to bear insults to the danger of our lives, to stand still with such a number of people round us, throwing such things at us, and threatening our lives, until we are disabled to defend ourselves.

"Where a known felony, is attempted upon the person, be it to rob, or murder, here the party assaulted may repel force with force, and even his own servant then attendant on him, or any other person present, may interpose for preventing mischief, and if death ensues, the party so interposing will be justified.—In this case nature and social duty co-operate." Foster 274. Hawkins, P. C. Chap. xxviii, Sec. 25, towards the end, "Yet it seems that a private person, a *fortiori*, an officer of justice, who happens unavoidably to kill another in endeavoring to defend himself from, or suppress dangerous rioters, may justify the fact, inasmuch as he only does his duty in aid of the public justice." Section 24. "And I can see no reason why a person, who without provocation is assaulted by another, in any place whatsoever, in such a manner as plainly shows an intent to murder him, as by discharging a pistol, or pushing at him with a drawn sword, etc., may not justify killing such an assailant, as much as if he had attempted to rob him: For is not he who attempts to murder me more injurious than he who barely attempts to rob me? And can it be more justifiable to fight for my goods than for my life; and it is not only highly agreeable to reason that a man in such circumstances, may lawfully kill another, but it seems also to be confirmed by the general tenor of our law books, which speaking of homicide *se defendendo*, suppose it done in some quarrel or affray." "And so perhaps the killing of dangerous rioters, may be justified by any private persons, who cannot otherwise suppress them, or defend themselves from them; inasmuch as every private person seems to be authorized by the law, to arm himself for the purposes aforesaid."—Hawkins, p. 71, Sec. 14. Here every private person is authorized to arm himself, and on the strength of this authority, I do not deny the inhabitants had a right to arm themselves at that time, for their defense, not for offense, that distinction is material and must be attended to. Hawkins, p. 75, Sec. 14. "And not only he who on an assault retreats to the wall or some such strait, beyond which he can go no further, before he kills the other, is judged by

at certain critical seasons, even in the mildest government, the people are liable to run into riots and tumults. There are church quakes and state quakes, in the moral and political world, as well as earthquakes, storms and tempests, in the physical. Thus much, however, must be said in favor of the people and of human nature, that it is a general if not an universal truth, that the aptitude of the people to mutinies, seditions, tumults and insurrections, is in direct proportion to the despotism of the government. In governments completely despotic, where the will of one man is the only law, this disposition is most prevalent; in aristocracies, next; in mixed monarchies, less than in either of the former; in complete republics, least of all; and, under the same form of government as in a limited monarchy, for example, the virtue and wisdom of the administration may generally be measured by the peace and order that are seen among the people. However this may be, such is the imperfection of all things in this world, that no form of government, and perhaps no wisdom or virtue in the administration, can at all times avoid riots and disorders among the people.

Lord C. J. Holt, in Mawridge's Case Kelyng 128, says, "Now it hath been held, that if A of his malice prepensed assaults B to kill him and B draws his sword and attacks A and pursues him, then A for his safety gives back and retreats to a wall, and B still pursuing him with his drawn sword, A in his defense kills B. This is murder in A. For A having malice against B, and in pursuance thereof endeavoring to kill him, is answerable for all the consequences of which he was the original cause. It is not reasonable for any man that is dangerously assaulted, and when he perceives his life in danger from his adversary, but to have liberty for the security of his own life, to pursue him that maliciously assaulted him; for he that hath manifested that he hath malice against another, is not fit to be trusted with a dangerous weapon in his hand—And so resolved by all the Judges when they met at Seargent's Inn, in preparation for my Lord Morley's trial."

In the case here, we will take Montgomery, if you please, when he was attacked by the stout man with the stick, who aimed it at his head, with a number of people round him, crying out, kill them! kill them! had he not a right to kill the man. If all the party were guilty of the assault made by the stout man, and all of them had discovered malice in their hearts, had not Montgomery a right, according to Lord Chief Justice Holt, to put it out of their power to wreak their malice upon him. I will not at present, look for any more authorities in the point of self-defense; you will be able to judge from these how far the law goes, in justifying or excusing any person in defense of himself, for taking away the life of another who threatens him, in life or limb: the next point is this, That in case of an unlawful assembly, all and every one of the assembly is guilty of all and every unlawful act, committed by any one of that assembly, in prosecution of the unlawful design they set out upon.

The policy of the law hath framed such strong discouragements, to secure the people against tumults; because when they once begin, there is danger of their running to such excesses, as will overturn the whole system of government—— There is the rule from the reverend sage of the law, so often quoted before. "All present aiding and assisting, are equally principal with him that gave the stroke, whereof the party died. For though one gave the stroke, yet in interpretation of the law, it is the stroke of every person, that was present aiding and assisting. If divers come with one assent to do mischief, as to kill, rob, or beat, and one doth it, they are all principals in the felony. If many be present and one only gives the stroke whereof the party dies, they are all principal, if they came for that purpose."

Now if the party at Dock Square, came with an intention only to beat the soldiers, and began the affray with them, and any of them had been accidentally killed it would have been murder because it was an unlawful design they came upon; if but one does it they are all considered in the eye of the law to be guilty if any one gives the mortal stroke, they are

all principal here, therefore there is a reversal of the scene; if you are satisfied that these soldiers were there on a lawful design and it should be proved any of them shot without provocation and killed any body, he only is answerable for it. 1st Hale P. C. "Although if many come upon an unlawful design, and one of the company kill one of the adverse party, in pursuance of that design, all are principals: yet if many be together upon a lawful account, and of the company, kill another of an adverse party without any particular abettment of the rest to this fact of homicide they are not all guilty that are of the company but only those that gave the stroke or actually abetted him to do it. In the case of a riotous assembly to rob or steal deer, or do any unlawful act of violence there the offense of one is the offense of all the company. The Lord Dacre and divers others went to steal deer in the park of one Pelham—Raydon one of the company, killed the keeper in the park; the Lord Dacre and the rest of the company being in the other part of the park. Yet it was adjudged murder in them all and they died for it. And he quotes Crompton, 25. Dalton, 93, p. 241." So that in so strong a case as this, where this nobleman set out to hunt deer in the ground of another, he was in one part of the park, his company in another part, yet they were all guilty of murder. The next is Hale's Pleas of the Crown, I. H. H. P. C. 440. "The case of Draton Bassit, diverse persons doing an unlawful act, all are guilty of what is done by one." Foster, 353, 354. "A general resolution against all opposers, whether such resolution appears upon evidence to have been actually and implicity entered into by the confederates, or may reasonably be collected from their number, arms or behavior, at, or before the scene of action, such resolutions, so proved, have always been considered as strong ingredients in cases of this kind. And in cases of homicide, committed in consequence of them, every person present, in the sense of the law, when the homicide hath been committed hath been involved in the guilt of him that gave the mortal blow." Foster. "The cases of Lord Dacre mentioned by Hale, and

of Pudsey, reported by Crompton, and cited by Hale, turned upon this point. The offenses they respectively stood charged with as principals, were committed far out of their sight and hearing: and yet both were held to be present. It was sufficient, that at the instant the facts were committed, they were of the same party and upon the same pursuit, and under the same engagements and expectations of mutual defense and support, with those that did the facts."

Thus far I have proceeded, and I believe it will not be hereafter disputed by any body, that this law ought to be known to every one who has any disposition to be concerned in an unlawful assembly, whatever mischief happens in the prosecution of the design they set out upon, all are answerable for it. It is necessary we should consider the definitions of some other crimes, as well as murder; sometimes one crime gives occasion to another, an assault is sometimes the occasion of manslaughter, sometimes of excusable homicide. It is necessary to consider what is a riot. 1. Hawk, Chap. 65, Sec. 2. I shall give you the definition of it. "Whosoever more than three persons use force or violence, for the accomplishment of any design whatever, all concerned are rioters."

Were there not more than three persons in Dock Square? Did they not agree to go to King street, and attack the main guard? Where then, is the reason for hesitation, at calling it a riot? If we cannot speak the law as it is, where is our liberty? And this is law, that wherever more than three persons are gathered together, to accomplish any thing with force, it is a riot. 1. Hawk, Chap. 65, Sec. 2.—"Wherever more than three, use force and violence, all who are concerned therein are rioters; but in some cases wherein the law authorizes force, it is lawful and commendable to use it. As for a sheriff, 2 and 67 Poph. 121, or constable 3 H. 7, 10, 6, or perhaps even for a private person, Poph. 121, Moore 656, to assemble a competent number of people in order, with force to oppose rebels, or enemies, or rioters, and afterwards with such force, actually to suppress them."

I do not mean to apply the word "rebel" on this occasion.

I have no reason to suppose that there ever was one in Boston, at least among the natives of the country. But rioters are in the same situation, as far as my argument is concerned, and proper officers may suppress rioters, and so may even private persons. The defense is not put on the sole ground that they were acting in obedience to orders; but as citizens who were entitled to the protection of the laws as much as any other citizens. The sentry being attacked in the street by a mob, any persons had a right to go to his assistance, and endeavor to suppress the riot. Suppose a press-gang should come on shore in this town, and assault any sailor, or householder in King street, in order to carry them on board one of his majesty's ships, and impress him without any warrant, as a seaman in his majesty's service, how far do you suppose the inhabitants would think themselves warranted by law to interpose against that lawless press-gang? I agree that such a press-gang would be as unlawful an assembly as that was in King street. If they were to press an inhabitant, and carry him off for a sailor, would not the inhabitants think themselves warranted by law to interpose in behalf of their fellow citizens? Now, gentlemen, if the soldiers had no right to interpose in the relief of the sentry, the inhabitants would have no right to interpose with regard to the citizen, for whatever is law for a soldier is law for a sailor and for a citizen, they all stand upon an equal footing in this respect. I believe we shall not have it disputed, that it would be lawful to go into King street and help an honest man there against the press-master.

Now, suppose you should have a jealousy in your minds, that the people who made this attack on the sentry had nothing more in their intention than to take him off his post, and that was threatened by some; suppose they intended to go a little farther, and tar and feather him, or to ride him (as the phrase is in Hudibras), he would have had a good right to have stood upon his defense, the defense of his liberty, and if he could not preserve that without hazard to his own life, he would be warranted in depriving those of life

who were endeavoring to deprive him of his; that is a point I would not give up for my right hand, nay, for my life.

Well, I say, if the people did this, or if this was only their intention, surely the officer and soldiers had a right to go to his relief, and therefore they set out upon a lawful errand, they were therefore a lawful assembly, if we only consider them as private subjects and fellow citizens, without regard to mutiny acts, articles of war, or soldiers' oaths; a private person, or any number of private persons, have a right to go to the assistance of their fellow subject in distress and danger of his life, when assaulted and in danger from a few or a multitude.

It is not pretended that all who were killed were engaged in the assault on the soldiers, but if the soldiers fired in self-defense against those who were actually assaulting them, and others were killed, they were not guilty of murder; for if it was justifiable or excusable in them to kill any one of the rioters, it was equally justifiable or excusable, if in firing at him they killed another who was innocent. So if the provocation was such as to mitigate the guilt to manslaughter, it would equally mitigate the guilt, if they killed an innocent man undesignedly, in aiming at those who gave the provocation.

(*Mr. Adams* then entered into an exposition of the law relating to manslaughter, contending that if the killing in this case were not justifiable or excusable, it was done under such circumstances as reduced the offense to manslaughter, and continued):

An assault and battery, committed upon a man in such a manner as not to endanger his life, is such a provocation as the law allows to reduce killing down to the crime of manslaughter. Now the law has been made on more consideration than we are capable of making at present; the law considers a man as capable of bearing anything and everything but blows. I may reproach a man as much as I please, I may call him a thief, robber, traitor, scoundrel, coward, lobster, bloody back, and if he kills me it will be murder, if nothing

else but words precede; but if from giving him such kind of language, I proceed to take him by the nose, or fillip him on the forehead, that is an assault, that is a blow; the law will not oblige a man to stand still and bear it; there is the distinction; hands off, touch me not; as soon as you touch me, if I run you through the heart it is but manslaughter; the utility of this distinction, the more you think of it, the more you will be satisfied with it; it is an assault whenever a blow is struck, let it be ever so slight, and sometimes even without a blow. The law considers man as frail and passionate; when his passions are touched he will be thrown off his guard; and therefore the law makes allowances for this frailty, considers him as in a fit of passion, not having the possession of his intellectual faculties; and consequently does not oblige him to measure out his blows with a yard-stick, or weigh them in a scale; let him kill with a sword, gun, or hedge-stake, it is not murder, but only manslaughter.

December 4.

(*Mr. Adams* proceeded to a minute consideration of every witness in the case, and endeavored to show, that the assault upon the soldiers was sufficiently dangerous to justify them in the course they took; at least, that it was sufficiently provoking to reduce the crime to manslaughter.)

The soldiers were chained to the spot by the command of their officer. They were bound by their oath to obedience. They could not defend themselves against so many people as were pressing on them. They had every reason to believe their lives were in danger. They were a lawful assembly, and the people attacking them were, by every principle of law, a mob. We have been entertained with a great variety of phrases, to avoid calling this sort of people a mob. Some call them shavers, some call them geniuses. The plain English is, gentlemen, most probably, a motley rabble of saucy boys, negroes, and mulattos, Irish teagues and outlandish jack tars. And why we should scruple to call such a set of people a mob, I cannot conceive, unless the name is too

respectable for them. The sun is not about to stand still or go out, nor the rivers to dry up, because there was a mob in Boston on the fifth of March that attacked a party of soldiers. Such things are not new in the world, nor in the British dominions, though they are, comparatively, rarities and novelties in this town. Carr, a native of Ireland, had often been concerned in such attacks, and, indeed, from the nature of things, soldiers quartered in a populous town, will always occasion two mobs, where they prevent one. They are wretched conservators of the peace!

But in regard to all but two of the prisoners there was no evidence to convict them even of manslaughter, because there was no direct proof that any but Killroy and Montgomery caused the death of any one. There were eight prisoners charged with the murder of five persons. Now it was fully proved, that one of the prisoners did not fire, and the gun of another flashed. Two, at least, of the prisoners were innocent, and one of these was not known. In this uncertainty, therefore, the jury must acquit all, unless there was positive proof that some of the rest did fire and did cause the death of some who were killed. It was said that there was evidence of this sort against Killroy and Montgomery; and proof was introduced to show that the former had uttered threats against the people, and that he had a particular spite against Gray, whom he was supposed to have killed, the latter having been engaged with him in the previous affray at the ropewalks. But the rule of law was, if there had been malice between the two, and at a distance of time afterwards they met, and one of them assaulted the other and was killed in consequence, the law presumed that the killing was upon the provocation, and not on account of the antecedent malice. If, therefore, the assault upon Killroy was so violent as to endanger his life, he had as good a right to defend himself, as if he had never before conceived any malice against Gray. It was true that Hemmingway, the sheriff's coachman, had sworn, that he knew Killroy and that he heard him say, he would never miss an opportunity of firing upon the inhabi-

tants; this was to prove that Killroy had preconceived malice in his heart, not indeed against the unhappy persons who were killed, but against the inhabitants in general; that he had the spirit not only of a Turk or an Arab, but of the devil. But admitting that this testimony was literally true, and that he had all the malice they would wish to prove, yet, if he was assaulted that night, and his life in danger, he had a right to defend himself as well as another man; if he had malice before, it did not take away from him the right of defending himself against any aggressor. But it was not at all improbable, that there was some misunderstanding about these loose expressions; perhaps the man had no thoughts of what his words might imply; many a man in his cups, or in anger, which was a short fit of madness, uttered the rashest expressions, who had no such savage disposition in general; so that there was but little weight in expressions uttered at a kitchen fire, before a maid and a coachman, where he might think himself at liberty to talk as much like a bully, a fool, or a madman as he pleased, and that no evil would come of it.

In regard to Montgomery, the evidence was clear that he was personally assaulted and knocked down before he fired. When the multitude was shouting and huzzaing, and threatening life, the bells ringing, the mob whistling, screaming, and rending like an Indian yell; the people from all quarters throwing every species of rubbish they could pick up in the street, and some who were quite on the other side of the street throwing clubs at the whole party; Montgomery in particular smitten with a club and knocked down, and as soon as he could rise and take up his firelock, struck on his breast or shoulder by another club from afar, what could he do? Did the jury expect he should behave like a stoic philosopher lost in apathy—patient as Epictetus, while his master was breaking his legs with a cudgel? It was impossible they should find him guilty of murder. They must suppose him divested of all human passions, if they did not think him at the least provoked, thrown off his guard, and into the *furor brevis*, by such treatment as this.

Attucks, whom Montgomery was supposed to have killed, appeared to have undertaken to be the hero of the night, and to lead this army with banners, to form them in the first place in Dock square, and march them up to King street with their clubs. They passed through the main street up to the main guard, in order to make the attack. If this was not an unlawful assembly, there never was one in the world. Attucks, with his mirmidons, comes round Jackson's corner, and down to the party by the sentry box; when the soldiers pushed the people off, this man with his party cried, "do not be afraid of them, they dare not fire, kill them! kill them! knock them over!"—and he tried to knock their brains out. It was plain the soldiers did not leave their station, but cried to the people, "stand off." Now to have this reinforcement coming down under the command of a stout mulatto fellow, whose very looks were enough to terrify any person, what had not the soldiers then to fear? He had hardiness enough to fall in upon them, and with one hand took hold of a bayonet, and with the other knocked the man down. This was the behavior of Attucks; to whose mad proceedings, in all probability, the dreadful carnage of that night was chiefly to be ascribed. And it was in this manner this town had been often treated; a Carr from Ireland, and an Attucks from Framingham, happening to be here, shall sally out upon their thoughtless enterprises, at the head of such a rabble of negroes and worthless characters as they can collect together, and then there were not wanting persons to ascribe all their doings to the good people of the town.

Gentlemen of the Jury, I will enlarge no more on the evidence, but submit it to you. Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence. Nor is the law less stable than the fact; if an assault was made to endanger their lives, the law is clear, they had a right to kill in their own defense; if it was not so severe as to endanger their lives, yet if they were assaulted at all, struck and abused by blows of any sort, by snowballs, oyster shells,

cinders, clubs, or sticks of any kind; this was a provocation, for which the law reduces the offense of killing down to manslaughter, in consideration of those passions in our nature, which cannot be eradicated. To your candor and justice I submit the prisoners and their cause.

The law, in all vicissitudes of government, fluctuations of the passions, or flights of enthusiasm, will preserve a steady undeviating course; it will not bend to the uncertain wishes, imaginations, and wanton tempers of men. To use the words of a great and worthy man, a patriot, and an hero, an enlightened friend of mankind, and a martyr to liberty; I mean Algernon Sidney, who from his earliest infancy sought a tranquil retirement under the shadow of the tree of liberty, with his tongue, his pen, and his sword: "The law," says he, "no passion can disturb. 'Tis void of desire and fear, lust and anger. 'Tis *mens sine affectu;* written reason; retaining some measure of the divine perfection. It does not enjoin that which pleases a weak, frail man, but without any regard to persons, commands that which is good, and punishes evil in all, whether rich or poor, high or low—'Tis deaf, inexorable, inflexible." On the one hand it is inexorable to the cries and lamentations of the prisoners; on the other it is deaf, deaf as an adder to the clamors of the populace.

MR. PAINE FOR THE PROSECUTION.

Mr. Paine. It now remains to close this case on the part of the crown—a cause which from the importance of it has been examined with such minuteness and protracted to such a length that I fear it has fatigued your attention, as I am certain it has exhausted my spirits. It may, however, serve to show you, gentlemen, and all the world, that the benignity of the English law, so much relied on by the counsel for the prisoners, is well known and attended to among us, and sufficiently applied in the case at the bar. Far be it from me to advance, or even to insinuate any thing to the disparagement of that well known principle of English law, in support of

which, the counsel for the prisoners, last speaking, has produced so many authorities; nor should I think it necessary to remark particularly on it, but that it has been traced through so many volumes, and urged with so much eloquence and zeal, as though it were the foundation of their defense, or at least an argument chiefly relied on. But if you consider this sort of reasoning for a moment, you will be sensible that it tends more to amuse than to enlighten; and without great caution may captivate your minds to that principle of law, which is endeared by the attributes of mercy and benignity, while it draws you entirely from justice—that essential principle, without which the laws were but an empty sound. Justice, strict justice, is the ultimate object of our laws, and to me it seems no hard task to maintain, that the attribute of benignity or mercy, can be ascribed to nothing abstracted from that of justice; and that a law all mercy would be an unjust law—and therefore, when we talk of benignity, we can understand nothing more than what is comprehended in Lord Coke's observation on our law in general, "that it is *ultima ratio*:" the last improvement of reason, which in the nature of it, will not admit any proposition to be true, of which it has not evidence; nor determine that to be certain, of which there remains a doubt. If, therefore, in the examination of this cause, the evidence is not sufficient to convince you beyond reasonable doubt, of the guilt of all, or of any of the prisoners, by the benignity and reason of the law, you will acquit them. But, if the evidence be sufficient to convince you of their guilt, beyond reasonable doubt, the justice of the law will require you to declare them guilty, and the benignity of the law will be satisfied with the fairness and impartiality of their trial. I am sensible, gentlemen, I have the severe side of the question to manage: I am to argue against the lives of eight of our fellow subjects; the very thought of which is enough to excite your compassion, and to influence my conduct. The counsel for the prisoners, well aware of their advantage, arising from the humane side of the question, have availed themselves of all the observations

proceeding therefrom; and have pressed the defense of the prisoners, by such appeals to the passions, in favor of life, as might be grating to your humanity should I attempt the like against life. Numberless are the observations which have been made, in order to set the prisoners in a favorable point of view, and to bring them within the notice of your compassion. It has been represented, "that the life of a soldier is thought to be less valuable among us, than the life of a private subject;" than which nothing can be more unfounded. Whatever of wrath and bitterness may have been expressed, by some, on account of the unhappy transaction, it was no more than would have been said, had the persons who did it not been soldiers. Nay the very appearance of this trial, the conduct of the witnesses and spectators, and all concerned in it, must satisfy any one, that a soldier's life is by no means undervalued; but that they have as fair an opportunity of defense as any other subjects. It has also been observed to you, that the evidence against the prisoners has been, for a long time past, published, and put into all your hands; and the supposed inconveniences which the prisoners labor under on that account, have been displayed with a vehemence of expression, the design of which, for my part, I am really at a loss to determine. The whole of the fact is this—immediately after the unhappy homicide, it was very naturally considered as attended with such circumstances as would engage the attention and authority of Great Britain; and as it was well known that representations were making and despatches about to be sent respecting the matter, it was thought necessary to collect and send such evidence as was feared would be omitted, that so we might not suffer in our conduct for want of it. The copies of these depositions were here sacredly concealed; nor would the contents of them have got abroad, but that copies from the other side of the water came over here; and being free of the control of the town, were reprinted, and for what I know, in some manner dispersed before the trial came on. But I am actually at a loss to determine, whether this undesigned or unexpected event,

has tended more to the advantage or disadvantage of the prisoners. For it is notorious, that by means of it, they have learnt the strength of the evidence against them, and had time to prepare to encounter it; which it is manifest by the points taken in their defense, they have endeavored to do; while the counsel for the crown, with all their supposed assistance, having neither heard nor seen the evidence to be produced for the prisoners, were surprised at a great part of it, and had not the same opportunity to prepare evidence to oppose it, which, perhaps, they might have found. But to what purpose is it to exclaim against the hard fate of the prisoners on account of that publication, or any supposed rancour against them, when you, gentlemen, know that you are not prejudiced in the cause, nor have formed any judgment respecting it, as you have solemnly declared on your oaths: And when nothing has been, or can be objected to the credibility of the witnesses for the crown, and when nothing appears of partiality in the manner or matter of their testimony; but even many things are testified by them, of which the counsel for the prisoners avail themselves in the defense, and which never could have escaped any person, whose mind was so unduly agitated with passion as has been complained of and pretended.

Relying upon it, therefore, gentlemen, that, as on the one hand, you have entertained none of these prejudices against the prisoners complained of, so on the other hand, you will not suffer yourselves to be amused with a supposition of facts, which do not exist, nor with representations and arguments which have no foundation.—I shall endeavor to address myself to your cool and candid reason; and, in the briefest manner I am able, consider the evidence that has been offered in their defense, the arguments and law, which have been applied to it; and then, observing on the evidence against the prisoners and the law operating thereon, I shall rest the matter with you, for a solemn and final decision.

In the first place, gentlemen, you perceive that a very considerable part of the evidence produced by the prisoners, is

designed to prove to you, that on the evening of the 5th of March, the town was in a general commotion; that vast numbers of people were seen coming from all parts of the town, armed with clubs and sticks of various sizes, and some with guns; and that they assembled at and near King street; that fire was cried, and the bells rung to increase the collection; and from all this you might be induced to believe that there was a general design, in a great number of the inhabitants, to attack the soldiers: That it was the inhabitants who began the disorders of the evening, and that all the evils and mischiefs of it, were the effects of their disorderly conduct. But, if we will recollect the evidence, we shall find, that previous to all this collection a number of soldiers had come out of their barracks, armed with clubs, bayonets, cutlasses and instruments of divers kinds, and in the most disorderly and outrageous manner were ravaging the streets, assaulting every one they met, and even running out of their way to assault and endager the lives of some of the most peaceable inhabitants who were standing at their own doors, and who neither did nor said any thing to them—and even vented their inhumanity on a little boy of twelve years of age—that some of them were conspiring and thratening to blow up Liberty tree in the same manner as had been lately done at New York; an account of which had just arrived. Consider also the testimony of a Colonel and others, who declare the outrageous appearance, behavior and threatening of the soldiers, at other times and places the same evening—and of those who give an account of the affray at Murray's barracks, where eighteen or twenty soldiers rushed out with cutlasses, etc., attacking all who came in their way, struck several persons, and cut an oyster-man on the shoulder, of whose testimony we are deprived by reason of his absence. This was probably the beginning of the affair at the barracks, of which so much has been said. There are yet other witnesses, to whose testimony I might refer, that you may consider in what light that transaction ought justly to be viewed; but I forbear.

The inhabitants, for a long time, had been fully sensible of

the evil disposition and abusive behavior of many of the soldiers toward them; and the most peaceable among them had found it necessary to arm themselves with heavy walking sticks, as weapons of defense when they went abroad. This was the occasion of the appearance of sticks in the hands of many of the citizens, as has been stated; and which was nothing more than might have been expected on any other night.

In order to draw this affair to one point of view, you will consider the account given you of the affray at the ropewalks, at four or five different times, a few days before, in some of which three of the prisoners at the bar were present; and which began in consequence of abuse from one of the soldiers, and before the unseemly answer was given by a workman, one of the citizens of the town. The testimony of Col. H., a magistrate, and several others, goes to show that the behavior of those soldiers was so riotous, barbarous, ungoverned and ungovernable, as to fill the minds of the inhabitants with alarming prospects; which, when added to their conduct on the unhappy evening, would naturally give rise to all that appearance. There can be no doubt, but that the collection of people, which was seen that night, was occasioned by many different causes. It is in evidence, that it was a bright moonlight evening; the pleasantness of which, increased by a new fallen snow, induced many persons to be walking the streets; hearing of the outrages committed by the soldiers, they stopped to see and inquire into the matter. And some of them might join those who had been abused, and make preparation to defend themselves. Such were those who had been abused at the barracks, and ran down to Dock Square and began to pull the legs from the butcher's stalls, as testified by some of the witnesses introduced by the counsel for the prisoners. Great numbers were also brought by the cry of fire and ringing of bells; which, it appears, was repeated by the soldiers as well as by some of the inhabitants. Upon this, many came out of their houses with bags and buckets, as usual in case of fire; and as they collected, asked where the

fire was. The account given by other witnesses, of the collection of the citizens, evidently refers to those who assembled on the soldiers rushing out, in the manner before mentioned. And though it cannot be fully justified, yet who will say, that any thing better could be expected when the people found they could not walk the streets in peace, without danger of assassination. But how does all this prove the grand point for which it was produced, namely, that there was a combination of the inhabitants to attack the soldiers? Does the threatening, rude and indecent speeches, of which so much pains has been taken to give you evidence, prove any thing like this? Is it to be wondered at, that among a number of people collected on such an occasion, there should be some who should rashly and without design express themselves in such a manner? And must the disposition and intention of the whole, be collected from such expressions heard only from a few?[1]

THE CHARGE TO THE JURY.

December 5.

Mr. Justice Trowbridge. Gentlemen of the Jury: The principal questions for your consideration are these:

First. Whether the five persons said to be murdered were in fact killed? And if so,

[1] The rest of the papers, which have been preserved, relating to this trial, are so torn and the notes therein so imperfect and disconnected, that it is impossible to determine the concluding remarks of *Mr. Paine*. It appears, however, from his very copious minutes, that he commented largely on the testimony, with much ingenuity and wit; that he stated the nature of the crime of murder, in so far as it is to be distinguished from manslaughter or simple homicide; and insisted that the conduct of the inhabitants was no justification for the firing of the soldiers, or the order of the captain for them to fire—that the first abuse and riot was from the soldiers at an earlier hour, which called the people together in the center of the town—that thus alarmed and agitated, some of them, chiefly boys, addressed the sentinel with threatening and abusive language—that some snowballs were thrown, and some hustling and pushing, when the crowd was about the sentinel, etc. But that the soldiers were not in danger of being beaten or wounded, as the citizens designed to act merely on the defensive, and therefore, that by the order to fire and by firing, the prisoners were justly charged with murder.

Second. Whether they, or either of them were killed by the prisoners, or either of them? And if they were, then,

Third. Whether such killing was justifiable, excusable or felonious? And if the latter,

Fourth. Whether it was manslaughter or murder?

As to the first, you have not only the coroner's inquest, but the testimony of so many witnesses, that the five persons were shot and thereby mortally wounded in the night of the fifth of March last, and that some of them died instantly, and the rest in a few days after, that you doubtless will be satisfied they were all killed. And the same evidence must, I think, also convince you that they were all killed by the party of soldiers that were at the custom-house that night, or by some of them.

Whether the prisoners were there, will therefore be your next inquiry; for if either of them was not, he must be acquitted. The law does not in this case make the testimony of two witnesses necessary for the jury to settle a fact upon; if one swears it, and upon his testimony you believe it, that is sufficient evidence for you to find the fact. But if you are satisfied upon the evidence, that all the prisoners were there, yet as each prisoner is severally charged with having killed these five persons, and by his plea has denied the charge, you must be fully satisfied upon the evidence given you, with regard to each prisoner, that he in particular did in fact, or in consideration of law, kill one or more of these persons that were slain, or he must be acquitted.

The way therefore to determine this will be for you to name some one of the prisoners, and then consider whether it appears upon the evidence in the case, that he did in fact kill Maverick; and, then, whether upon the evidence it appears he in fact killed Gray? And so inquire in the same manner, whether he did in fact kill either of the other three persons? And having noted how it appears upon the evidence with regard to him, you must then proceed in like manner with each of the other prisoners; and if upon a full consideration of the evidence in the case, you should be in doubt, as to any

one of the prisoners having in fact killed either of the persons that were slain, you must consider whether he did it in consideration of law? Now all that are present, aiding and abetting one person in killing another, do, in judgment of law, kill him. The stroke of one is, in consideration of law, the stroke of all. When a number of persons assemble together to do an unlawful act, and in the prosecution of that design one of them kills a man, all the rest of the company are in law considered as abetting him to do it.

You must therefore inquire how and for what purpose the prisoners came together at the custom-house, and what they did there before these persons were killed?

That a sentry was in fact then placed at the custom-house, by order of Colonel Dalrymple, the commanding officer, as also that one had been placed there for a long time before, is fully proved, and indeed the right to place sentries, it being in time of peace, is the only thing that has been questioned. Upon this, therefore, I would observe, that, as the main design of society is the protection of individuals by the united strength of the whole community; so for the sake of unanimity, strength and despatch, the supreme executive power is by the British constitution vested in a single person, the king or queen. This single person has sole power of raising fleets or armies; and a statute passed in the reign of Charles the Second declares, that within all his majesty's realms and dominions, the sole supreme government, command, and disposition of the militia, and of all the forces by sea and land, and all forts and places of strength, is and by the law of England ever was the undoubted right of his majesty and his royal predecessors, kings and queens of England; and as Charles the Second had this right as king of England, it of course comes to his successors, and our present sovereign lord the king now has it.

Indeed, the bill of rights declares among other things, that the raising or keeping a standing army within the kingdom in a time of peace, unless with the consent of parliament, is against law. And it is said, that upon the same principles

whereon that declaration was founded, it is alike unlawful to be done in any other part of the king's dominions. But be that as it may, the mutiny acts annually made, show the consent of parliament, that the king in time of peace should keep up a standing army not only in the kingdom but in America also. They not only ascertain the number of troops that shall be kept up, but provide for the regulation of such of the king's troops as are in America. And therefore, as by these acts the king is empowered to keep up these troops, and he by common law, has the command and disposition of all forces by sea and land within his dominions, and is the principal conservator of the peace, he doubtless well might send such part of those troops to this part of his dominions, in order to restore the public peace, or to aid and assist the civil magistrate in preserving of it, as he judged necessary for the purpose; and if you should think there was no occasion for sending any troops here, for either of those purposes that will not alter the case, because the king being the proper judge in that matter, the validity of his order will not depend upon the truth of the representations whereon it is founded. The acts not only fix the number of troops to be kept up, but also establish a law martial for their government. Among other things, the acts subject every officer or soldier that sleeps on his post, or leaves it before he is relieved, or disobeys the lawful command of his superior officer, to such punishment as a court martial shall inflict, though it extend to death itself. These troops are and ever since they came here have been under this martial law and subject to as strict regulation as in time of war. Placing sentries is a necessary part of the regulation of an army; accordingly a sentry hath in fact been kept at the custom-house ever since the troops have been here; and it is sworn that it was done by order of the commanding officer. If so, you have no reason to doubt but that it was legally done.

Your next inquiry then will be, whether the sentry so placed at the custom-house was attacked? Many witnesses have sworn that he was. But the counsel for the crown say, that

the contrary appears by the testimony of Colonel Marshall and others.

It is with you to determine this matter upon the whole of the evidence given you. In doing it you ought to reconcile the several testimonies, if by any reasonable construction of the words it may be done. Where some witnesses swear they saw such a thing done, and others swear they were present and did not see it; if the thing said to be done be such as it may reasonably be supposed some might see and others not, by reason of their want of observation, or particular attention to other matters there, as both may be true, you ought to suppose them to be so, rather than presume that any of the witnesses swear falsely. But if witnesses contradict each other, so that their testimonies cannot be reconciled, you must then consider the number of the witnesses on each side, their ability, integrity, indifference as to the point in question, and the probability or improbability arising from the nature of the thing in question, and, upon the whole, settle the fact as you verily believe it to be. If you find the sentry was attacked, the next thing to be considered is, whether the prisoners went to protect him, and if so, whether it was lawful for them so to do. There is a great difference between a common affray, and attacking the king's forces. I think the law in that regard ought to be more generally known here than it seems to be. If, upon a sudden quarrel from some affront given or taken, the neighborhood rise and drive the king's forces out of their quarters, it is a great misdemeanor, and if death ensues, it may be felony in the assailants, but it is not treason, because there was no intention against the king's person or government; but attacking the king's forces in opposition to his authority, upon a march or in quarters, is levying war against the king. And resisting the king's forces, if sent to keep the peace, may amount to an overt act of high treason. Though it may be attended with great inconveniences for private persons, without a peace officer, to make use of arms for suppressing an ordinary riot, yet if the riot be such an one as savors of rebellion, it doubtless may lawfully be done. You have heard what the witnesses

deposed respecting the resolution taken to drive the soldiers out of town, "because they had no business here." You have also heard what has been testified of the proposals to attack the main guard—of the assembling of the people, especially in Dock square, of the huzzaing for the main guard and King street, and of the attacking the sentry. Now, if this was done in pursuance of a resolution taken "to drive the soldiers out of the town because they had no business here," I will not now determine whether it was treason or not; but it certainly was a riot that savored of rebellion; for the suppression whereof, private persons might not only arm themselves, but make use of their arms, if they could not otherwise suppress it. Much more might the captain of the main guard take a part of the guard, armed as usual, and go with them to protect the sentry. From the evidence, it seems the sentry not only called to the main guard for assistance, but two men went and told them they must send assistance directly or the sentry would be murdered. Whereupon the captain gave orders, that a party should go to the assistance of the sentry, and they were drawn out accordingly, led down to the custom-house by a corporal, and followed by the captain. Now, as this party did not assemble or go there of their own accord, but were sent by their captain to protect the sentry, it must be supposed that was their design in going, until the contrary appears. And although upon the evidence you should not be satisfied that the sentry was attacked in pursuance of a resolution taken to drive the soldiers out of town, because they had no business here, yet considering the notice given to the captain of the danger the sentry was in, and what the captain himself might then see and observe of the attack upon the sentry, he well might order out such a party, and go with them to protect the sentry; and it seems to be agreed, that if the prisoners were at the custom-house that night, all of them, except the sentry, were of that party. But if they were a lawful assembly when they got to the custom-house, yet if afterwards they all agreed to do an unlawful act to the disturbance of the peace, and in prosecution of that design Maverick and the rest were killed,

all that party will by law be chargeable with each mortal stroke given by either of them, as though they all had in fact given it.

It is said, that while they were at the custom-house, before they fired, some of them attempted with their bayonets to stab every one they could come at, without any reason at all for so doing. Such conduct to be sure can neither be justified nor excused. But as the time was so very short, and some of the witnesses declare the people were crowding upon the soldiers and that they were moving their guns backwards and forwards, crying, "stand off," "stand off," without moving from their station, you will consider whether this may not be what other witnesses call an attempt to stab the people. But, be that as it may, if the party was a lawful assembly before, this not being the act of the whole would not make it unlawful. The counsel for the crown insist, that the firing upon the people was an unlawful act, in disturbance of the peace, and as the party fired so near together, it must be supposed they previously agreed to do it; that agreement made them an unlawful assembly, if they were not so before, and being so when they fired, all are chargeable with the killing by any one or more of them. However just this reasoning may be, where there is no apparent cause for their firing, yet it will not hold good where there is. If each of the party had been at the same instant so assaulted as that it would have justified his killing the assailant in defense of his own life, and thereupon each of them had at the same instant fired upon and killed the person that assaulted him, surely it would not have been evidence of a previous agreement to fire, or prove them to be an unlawful assembly; nor would it have been evidence of such agreement, if the attack was not such as would justify the firing and killing, though it was such an assault as would alleviate the offense and reduce it to manslaughter, since there would be as apparent a cause of the firing in one case as in the other, and though not so good a cause, yet such an one as the law in condescension to human frailty greatly regards. You will therefore carefully consider what the several witnesses have sworn

with regard to the assault made upon the party of soldiers at the custom-house, and if you thereupon believe they were before and at the time of their firing attacked by such numbers, and in such a violent manner as many of the witnesses have positively sworn, you will be able to assign a cause for their firing so near together as they did without supposing a previous agreement so to do. But it is said, that if their firing as they did does not prove a previous agreement to do it, yet it is good evidence of an actual abetment to fire, as one by firing encourages the others to do the like. As neither of the soldiers fired more than once, it is evident that he who fired last could not thereby in fact abet or encourage the firing of any of those who fired before him, and so it cannot be evidence of such abetment. And if he who fired first and killed can justify it, because it was lawful for him so to do, surely that same lawful act cannot be evidence of an unlawful abetment. And though he who first fired and killed may not be able to justify the doing it, yet if it appears he had such a cause for the killing as will reduce it to manslaughter, it would be strange indeed if that same act should be evidence of his abetting another who killed without provocation, so as to make him who fired first guilty of murder. The same may be said as to all the intermediate firings; and as the evidence stands, I do not think it necessary to say how it would be in case the first person fired with little or no provocation. If, therefore, this party of soldiers when at the custom-house were a lawful assembly and continued so until they fired, and their firing was not an actual unlawful abetment of each other to fire, nor evidence of it, they cannot be said in consideration of law to have killed those five persons or either of them, but it must rest on the evidence of the actual killing; and if so, neither of the prisoners can be found guilty thereof, unless it appears not only that he was of the party, but that he in particular did in fact kill one or more of the persons slain. That the five persons were killed by the party of soldiers or some of them, seems clear upon the evidence, and indeed is not disputed.

Some witnesses have been produced to prove that Mont-

gomery killed Attucks; and Langford swears Killroy killed Gray, but none of the witnesses undertake to say, that either of the other prisoners in particular killed either of the other three persons, or that all of them did it. On the contrary, it seems that one of the six did not fire, and that another of them fired at a boy as he was running down the street, but missed him (if he had killed him, as the evidence stands, it would have been murder), but the witnesses are not agreed as to the person who fired at the boy, or as to him who did not fire at all. It is highly probable, from the places where the five persons killed fell, and their wounds, that they were killed by the discharge of five several guns only. If you are upon the evidence satisfied of that, and also that Montgomery killed Attucks, and Killroy, Gray, it will thence follow that the other three were killed, not by the other six persons, but by three of them only; and therefore they cannot all be found guilty of it. And as the evidence does not show which three killed the three, nor that either of the six in particular killed either of the three, you cannot find either of the six guilty of killing them or either of them. If you are satisfied, upon the evidence given you, that Montgomery killed Attucks, you will proceed to inquire whether it was justifiable, excusable, or felonious homicide, and if the latter, whether it was maliciously done or not. As he is charged with murder, if the fact of killing be proved, all the circumstances of necessity or infirmity are to be satisfactorily proved by him, unless they arise out of the evidence produced against him, for the law presumeth the fact to have been founded in malice until the contrary appears.

You will, therefore, carefully consider and weigh the whole of the evidence given you respecting the attack made upon the party of soldiers in general, and upon Montgomery in particular. In doing it, you will observe the rules I have before mentioned, and not forget the part that some of the witnesses took in this unhappy affair, and if, upon the whole, it appears to you that Montgomery was attacked in such a violent manner that his life was in immediate danger, or that he had suffi-

cient reason to think it was, and he thereupon fired and killed Attucks for the preservation of his own life; it was justifiable homicide, and he ought to be acquitted. If you do not believe that was the case, but upon the evidence are satisfied that he was by that assembly assaulted with clubs and other weapons, and thereupon fired at the rioters and killed Attucks; then you ought to find him guilty of manslaughter only. But if, upon the evidence, you believe that Montgomery, without being previously assaulted, fired and killed Attucks; then you will find him guilty of murder. But you must know that if this party of soldiers, in general, were pelted with snowballs, pieces of ice and sticks, in anger, this without more amounts to an assault, not only upon those that were in fact struck, but upon the whole party; and is such an assault as will reduce the killing to manslaughter. And if you believe, what some of the witnesses have sworn, that the people round the soldiers, and many of them armed with clubs, crowded upon the soldiers, and with the cry of, "Rush on, kill them, kill them, knock them over," did in fact rush on, strike at them with their clubs, and give Montgomery such a blow, as to knock him down, as some of the witnesses say, or to make him sally, or stagger, as others say, it will be sufficient to show that his life was in immediate danger, or that he had sufficient reason to think so.

It seems that a doctrine has of late been advanced, that soldiers, while on duty, may, upon no occasion whatever, fire upon their fellow subjects, without the order of a civil magistrate. This may possibly account for some of those who attacked the soldiers, saying to them, "You dare not fire, we know you dare not fire." But it ought to be known that the law doth not countenance such an absurd doctrine. A man by becoming a soldier doth not thereby lose the right of self-defense, which is founded in the law of nature. Where any one is, without his own default, reduced to such circumstances that the laws of society cannot avail him, the law considers him "as still, in that instance, under the protection of the law of nature." This rule extends to soldiers as well as others;

nay, while soldiers are in the immediate service of the king, and the regular discharge of their duty, they rather come within the reason of civil officers and their assistants, and so are alike under the peculiar protection of the law.

If you are satisfied upon the evidence, that Killroy killed Gray, you will then inquire, whether it was justifiable, excusable, or felonious homicide, and if the latter, whether it was with or without malice. If the attack was upon the party of soldiers in general, and in the manner I have just mentioned, as some of the witnesses say it was, it is equally an assault upon all, whether all were in fact struck, or not, and makes no material difference, as to their respective right of firing; for a man is not obliged to wait until he is killed, or struck, before he makes use of the necessary means of self-defense. If the blows with clubs were, by an enraged multitude, aimed at the party in general, each one might reasonably think his own life in danger; for though he escaped the first blow, he might reasonably expect more would follow, and could have no assurance that he should be so fortunate as to escape all of them.

Therefore, I do not see but that Killroy is upon the same footing with Montgomery; and your verdict must be the same as to both, unless what Hemmingway swears Killroy said, or the affray at the rope-walks, or both, materially vary the case. Hemmingway swears, that he and Killroy were talking about the town's people and the soldiers, and that Killroy said, "He never would miss an opportunity, when he had one, to fire on the inhabitants; that he had wanted to have an opportunity, ever since he landed." But he says he cannot remember what words immediately preceded or followed, or at what particular time the words were uttered, nor does he know whether Killroy was jocular or not. If the witness is not mistaken as to the words, the speech was, at least, very imprudent and foolish. However, if Killroy, either in jest or in earnest, uttered those words, yet if the assault upon him was such, as would justify his firing and killing, or alleviate it so as to make it but manslaughter, that will not enhance the killing to murder. And though it has been sworn that Killroy, and

other soldiers, had a quarrel with Gray and others, at the rope-walks, a few days before the fifth of March, yet it is not certain that Killroy then knew Gray, or aimed at him in particular. But if Gray encouraged the assault by clapping the assailants on their backs, as Hinckley swears he did, and Killroy saw this, and knew him to be one of those that were concerned in the affray at the rope-walks, this very circumstance would have a natural tendency to raise Killroy's passions, and throw him off his guard, much more than if the same things had been done by another person. In the tumult of passion the voice of reason is not heard, and it is owing to the allowance the law makes for human frailty, that all unlawful voluntary homicide is not deemed murder. If there be "malice between A and B, and they meet casually, A assaults B, and drives him to the wall, B, in his own defense, kills A, this is *se defendendo*, and shall not be heightened by the former malice into murder or homicide at large, for it was not a killing upon the account of the former malice, but upon a necessity imposed upon him by the assault of A." So, upon the same principle, where the assault is such as would make the killing but manslaughter, if there had been no previous quarrel, the killing ought to be attributed to the assault, unless the evidence clearly shows the contrary; an assault being known and allowed by law to be a provocation to kill, that will free the party from the guilt of murder; whereas neither words of reproach, nor actions expressive of contempt, "are a provocation to use such violence," that is, the law doth not allow them to be, without an assault, such a provocation as will excuse the killing, or make it any thing less than murder. Upon the same principle, where the assault is such, as makes the killing manslaughter, the killing ought to be attributed to the assault, unless the evidence clearly shows the contrary.

This meeting of Killroy and Gray was casual upon the part of Killroy at least; he was lawfully ordered to the place where he was and had no right to quit his station without the leave of Capt. Preston, nor were any of the party obliged

to retreat and give way to the rioters, but might lawfully stand and repel force by force.

It is needless for me to say what you ought to do with regard to the other six prisoners, in case they had gone to the custom-house, not to protect the sentry but to disturb the peace or after they got there and before the firing had agreed so to do; or in case they had actually unlawfully abetted the killing: because none of these things have been testified, nor can any of them be deduced from any thing which has been given to you in evidence.

Having already said much more upon this occasion, than I should have thought necessary in a like case, at any other time, I shall add no more.

Mr. JUSTICE OLIVER and the other justices also summed up the evidence to the jury, and gave their opinions on the law and the evidence, but they differed in no material point from Mr. JUSTICE TROWBRIDGE, who, according to the custom of the court, spoke first.

THE VERDICT AND JUDGMENT.

The *Jury* withdrew and in two hours and a half returned into court, with a verdict of not guilty as to all the prisoners, except Killroy and Montgomery, who were found not guilty of murder but guilty of manslaughter. They prayed the benefit of clergy, which was allowed them, and thereupon they were each of them burnt in the hand, in open court, and were discharged.

THE TRIAL OF CAPTAIN THOMAS PRESTON FOR THE MURDER OF CRISPUS ATTUCKS AND OTHERS, BOSTON MASSACHUSSETS, 1770.

THE NARRATIVE AND TRIAL.

Before the trial of the eight soldiers was had (*ante*, p. 415) Captain Thomas Preston, who was in command of the regiment to which they belonged and who it was charged had ordered the soldiers to fire and who had been included in the indictments against them, was brought to trial before the same judges and with the same counsel. The trial of the soldiers was very fully reported by John Hodgson,[1] but of the captain's trial no minutes are known to exist. Only the names of the jurors have been preserved—William Frobisher, Joseph Trescott, Neal McIntire, Thomas Mayo, Josiah Sprague, Joseph Guild, Jonathan Parker, Gilbert Deblois, Philip Dumaresque, William Hill, William Wait Wallis, and James Barrick.

A few witnesses testified that he ordered his men to fire, but their evidence was encountered by that of several other witnesses, who stood near to him, and were conversing with him at a different place from that which the witnesses for the Crown swore he was in; and the judges, in summing up the evidence to the jury, were unanimous in their opinion, that he did not order his men to fire, but if he did, they were of opinion, that, from the evidence of many other witnesses, the assault, both on the officer and men while upon duty, was so violent, that the homicide could not amount even to manslaughter, but must be considered as excusable homicide.

The trial began on October 24, 1770, occupying about six days. In the course of it, Mr. Quincy pushed the examination and cross-examination of the witnesses to such an ex-

[1] *Ante*, p. 418.

tent, that Mr. Adams, in order to check it, told him that if he would not desist, he should decline to have any thing further to do in the cause. The prisoner and his friends were alarmed, and consulted about engaging other counsel; but Mr. Adams, sensible that there was sufficient evidence to obtain a favorable verdict from an impartial jury, had no intention to abandon his client; he only felt for the honor of the town, which, he apprehended would suffer yet more, if the witnesses were examined too closely and particularly, by which means more truth would be drawn from them than had an immediate connection with the soldiers' firing, by or without the orders of the captain. When the trial was ending, Judge Lynde, toward the close of his charge said: "Happy am I to find, after such strict examination, the conduct of the prisoner appear in so fair a light; yet I feel myself deeply affected, that this affair turns out so much to the disgrace of every person concerned against him, and so much to the shame of the town in general."[1] The jury at once agreed on a verdict of not guilty. After his acquittal, Captain Preston retired to the castle, and remained there until he sailed for England.[2]

[2] Chandler's Criminal Trials, Vol. 1, p. 311.

THE TRIAL OF EDWARD MANWARING, JOHN MUNRO, HAMMOND GREEN AND THOMAS GREENWOOD, FOR MURDER, BOSTON, MASSACHUSETTS, 1770.

THE NARRATIVE AND TRIAL.

On 12th of December following the trial of the eight British soldiers (*ante*, p. 415), four civilians described in the indictments[1] as Edward Manwaring, Esquire; John Munro, gentleman; Hammond Green, boat builder, and Thomas Greenwood, laborer, were put upon trial charged with being present, aiding and assisting in the murder of the citizens who were killed on the fifth of March. The evidence for the prosecution tended to show that the prisoners, or a part of them, fired on the crowd from the windows of the custom-house at the same time as the soldiers fired in the street. But the principal witness, Charles Bourgat, a French boy and servant of Manwaring, was contradicted on every material point, and was worthy of no credit. So the jury acquitted all the prisoners without leaving their seats.[2] As in the case of Captain Preston's trial no minutes of this trial exist, though at the end of Hodgson's long report of the Trial of the Soldiers there is this note: "It may be proper here to observe, that Edward Manwaring, John Munro, Hammond Green, and Thomas Greenwood, who were charged by the Grand Jury, with being present, aiding, abetting, assisting, etc., William Warren in the murder of Crispus Attucks, as is at large set forth in the indictment, were tried on the 12th of December following, and all acquitted by the Jury, without going from their seats."

[1] *Ante*, p. 419.

[2] Chandler, p. 415.

THE TRIAL OF JACOB LEISLER FOR HIGH TREASON. NEW YORK CITY, 1691.

THE NARRATIVE AND TRIAL.[1]

James II of England was very unpopular in the Colonies of New York and New England, and a rebellion had broken out against the Governor, that he had sent there, when news came that the invasion of England by the Prince of Orange had been successful and of the accession of William to the throne. The rebels found a chief in Jacob Leisler, a New York merchant of standing, and a zealous friend of the protestant cause, who had formerly suffered imprisonment by the order of Andros,[2] for opposing one of his illegal acts while governor of New York.

The immediate occasion of the revolt was a report in May, 1689, that the papists intended to attack and massacre the people while at church in the Fort, and declare for James II. The people seized the Fort and appointed a committee of safety for the immediate government of the province, who signed an agreement to adhere to the prince of Orange, and, with their lives, to support the protestant religion, and they

[1] *Bibliography.* *Chandler's American Criminal Trials. (See 1, Am. St. Tr. 116.) Mr. Chandler says that though the insurrection of Leisler and his adherents, which distracted the province of New York, long after the principal actors in the scene had passed from the stage, form a prominent topic of remark in the histories of the period, no detailed report of the trial was ever printed, and of the actual proceedings on that occasion but little can now be ascertained.

[2] ANDROS, SIR EDMUND. (1637-1714.) Born on Island of Guernsey; Administrator of Colony of New York, 1674; Governor of all New England, 1686; imprisoned and impeached in 1689, and sent to England for trial; Governor of Virginia, 1692-1698; founded William and Mary College; Governor Island of Guernsey, 1704; died in London.

published a declaration that "as soon as the bearer of orders from the prince of Orange shall let us see his power, then without delay we do intend to obey, not the orders only, but also the bearer thereof."

Massachusetts and Connecticut gave countenance to his measures, and his authority was soon generally acknowledged by the middle and lower classes. Nicholson,[8] the lieutenant governor, fled to England, and Courtlandt, the mayor of New York, Colonel Bayard, and others of his council, "gentlemen of figure," unable to brook the ascendency of a man, "mean in his abilities, and inferior in his degree," retired to Albany and seized the fort there, declaring that they held it for William and Mary, but would maintain no connection with Leisler. Each party now professed allegiance to the same sovereign, and denounced the other as rebels. Leisler sent Milborne, his son-in-law, to Albany to demand the surrender of the fort, which was refused. Afterwards letters were received from England, addressed to Nicholson, or, in his absence, to "such as, for the time being, take care for preserving the peace and administering the law" in New York. After some hesitation on the part of the messenger, occasioned by the attempts of the party at Albany to obtain possession of the despatches, they were delivered to Leisler. They contained a commission to Nicholson, "to do every thing appertaining to the office of lieutenant governor, according to the laws and customs of New York until further orders." Nicholson having left the province, Leisler consid-

[8] NICHOLSON, FRANCIS. (1660-1728.) Born in England; in early manhood was a British soldier; came to America, 1684, as lieutenant in British army; appointed lieutenant, or deputy Governor of New York under Sir Edmund Andros, 1688; after Andros' arrest, sole head of government, 1689-1690; driven out by Jacob Leisler and his rebels; Governor of Virginia, 1691-1692; Lieutenant Governor of Maryland, 1694; Governor of Virginia again, 1699-1705; served in the army, 1705-1710; was Governor of Nova Scotia, 1712-1717; of South Carolina, 1721-1725; left America for the last time in 1725; died in London; as a colonial governor he established schools, improved condition of the clergy and urged a vigorous policy against Canada. (See Dictionary of National Biography; New International Encyclopedia.)

ered the commission as directed to himself, and esteemed his authority to have received the royal sanction. By advice of the committee of safety, he now assumed the title of lieutenant governor. To add strength to his party, a convention was summoned of deputies from all the towns to which his influence extended, and various regulations were adopted for the temporary government of the province.

Nicholas Bayard, a member of the Albany convention, being found in New York, was arrested and imprisoned for high misdemeanors, and for certain libellous writings, containing "execrable lies and pernicious falsehoods." The convention at Albany was dissolved, the members took refuge in the neighboring colonies, and there was soon no open and organized opposition to Leisler's authority. King William had received Leisler's messenger in a flattering manner; but Nicholson, who had arrived in England, contrived to poison the royal ear against the man who first raised the standard of the revolution in New York, and Leisler vainly waited for any express confirmation of his power, or thanks for his efforts in the cause of his sovereign.

Sloughter[4] was appointed governor in 1689; arriving in New York in March, 1691, he sent Ingolsby to demand the surrender of the fort. Leisler's fears for his safety, or his love of power, overcame his prudence, and he refused to obey, thus giving his enemies a pretense for his destruction, which otherwise they would have vainly sought in all his acts. A second demand was made, but Leisler knew that his enemies had obtained the ear of the governor, and, in the effort of folly and despair to secure his own safety, he still hesitated, but sent messengers to the governor, who were immediately seized as rebels. Leisler now abandoned the fort,

[4] SLOUGHTER, HENRY. Appointed Governor of New York by William of Orange, to succeed Jacob Leisler; commission was dated September, 1689, but because of delay in England and mishaps to his vessel at Bermuda, Sloughter did not reach New York until 1691; had Jacob Leisler and Jacob Milborne hanged, May, 1691; Sloughter died suddenly, in New York, July 23, 1691. (See Roberts, New York, Vol. I.)

and was seized and thrown into prison, together with his son-in-law and several of his adherents.

The prisoners were immediately brought to trial before a special court of oyer and terminer. Six of the inferior insurgents were convicted of high treason, and were subsequently reprieved. Leisler and Milborne denied to the governor the power to institute a tribunal for judging his predecessor, and vainly appealed to the king. The trials proceeded before a tribunal, erected for the purpose of giving the sanctions of the law to the determinations of power. Joseph Dudley,[5] the chief justice, had been expelled from Boston by the same general revolution to which Leisler owed his elevation. How could the latter expect a favorable appreciation of his conduct from a tribunal, erected by his enemies, and occupied by an exasperated antagonist? Refusing to plead to the charge against him, he was convicted by the jury, and was condemned to death, with Milborne, as a rebel and a traitor.

The governor hesitated to destroy the men, who first raised the standard of William of Orange and protestantism. "Certainly never greater villains lived," he wrote; but he "resolved to wait for the royal pleasure, if by any other means than hanging he could keep the country quiet." But the enemies of Leisler were bent on his death. They invited Sloughter to a feast, and, when his reason was drowned in his cups, he was prevailed on to sign the death warrant; before he recovered his senses, the prisoners were executed.

[5] DUDLEY JOSEPH. (1650-1720.) Born in Massachusetts; judge at the time of the revolution in 1689, when he was imprisoned, and was sent to England with Andros; appointed Chief Justice of New York, 1690; subsequently Lieutenant Governor of the Isle of Wight, and a member of Parliament; returned to Boston in 1702, as Governor of Massachusetts; no citizen of New England enjoyed so many public honors and offices; he was a learned man, and, in private life was amiable, dignified, and elegant in his manners; his conduct at the trial of Leisler is a blot on his character, and was the ground of severe charges against him in England; died in Roxbury, Mass.

THE EXECUTION.

On May 16th, 1691, Leisler, with his son-in-law, Milborne, was led to the gallows. Parting with his wife Alice, and his numerous family, he met his death with fortitude, and as became a christian. After praise to God, he expressed his sense of his dying state and submitted himself before a just God with humility and hope. He avowed that, at the request of a committee, chosen by the major part of the inhabitants of the province, he had taken upon him, "to the great grief of relations to be left behind," weighty matters of state, "requiring a more wise, cunning, and powerful pilot to govern;" an undertaking for which his motives were the protestant interest, and the establishment of the government of William and Mary. It was true, he said, that in this endeavor for the public good, several enormities had been committed against his will. He had longed to see a governor sent, to put a period to the disorders existing; some of which, on his part, were committed through ignorance, some through jealous fear, some through misinformation and misconstruction, and some through rashness or passion. For all his offenses, he asked pardon of God, and of all persons offended. His enemies he forgave, and prayed that all malice might be buried in the grave.

He enjoined upon his friends to forget any injury done to him. He prayed for the good of the province, and, as his last words, declared, that, as to the matter for which he was condemned, his purpose was for the good of his fellow creatures, according to the understanding and ability which he possessed, by preventing popery and upholding the government of William and Mary. He concluded a prayer for all in authority, by one for comfort to his own afflicted family; and he asked for them the charity of all, and their prayers for himself.

Being asked by the sheriff "if he was ready?" he said "yes," and requested that his body might be delivered to his wife; and, as his family had been educated as christians, he

hoped they would act as such. Turning to Milborne, he exclaimed, "why must you die? you have been but as a servant, doing my will; and, as I am a dying man, I declare before God and the world, that what I have done was for King William and Queen Mary, the defense of the protestant religion, and the good of the country." Having again professed his reliance on God, he signified his readiness to depart, and his sufferings were soon ended.

The populace, overawed by the soldiers, were dreadfully agitated by this painful spectacle. The shrieks of fainting women were terrible to hear; and the torrents of rain added to the gloom and horror of the scene. When the prisoner was dead, his garments were cut in pieces by the crowd, and his hair was divided as the precious relics of a martyr. At the same hour, and in the same town, the members of the council and the judges were revelling in beastly triumph, and with them the governor, insensible at his cups, was delayed until the execution was over!

After his death his son appealed to the king; the attainder was reversed and his estate restored to his family.

THE TRIAL OF NICHOLAS BAYARD FOR HIGH TREASON, NEW YORK CITY, 1702.

THE NARRATIVE.

Jacob Leisler fell a victim to the malignant feelings engendered by political contentions in the Provinces in 1691; and the passions, excited in his adherents by his melancholy fate, continued long to distract the public councils, and to embitter the social intercourse of the inhabitants of the province. His son, Jacob, unmindful of his father's dying request, made upon the gallows, could never forget or forgive his melancholy death, and lost no opportunity to vindicate his name, and to cast odium upon those who had been instrumental in the wrongs he suffered; nor was he unsuccessful.

The aristocratic party maintained their influence with those in power until the arrival of Lord Bellamont in 1698, as governor of the province. The sympathies of that nobleman had been excited in England by young Leisler, in favor of his adherents, who were thus favored by the governor's countenance and support. At the death of this nobleman, in 1701, the ancient animosities of the rival factions were revived with the utmost zeal and fury. Information being received that Lord Cornbury[a] was to succeed the Earl of Bella-

[a] CORNBURY, EDWARD HYDE. (1661-1724.) Third Earl of Clarendon, Second Lord Cornbury; born in England, son of Henry Hyde, Second Earl of Clarendon; M. P. for Wiltshire, 1685-1695; for Christchurch, 1695-1701; Captain General and Governor-in-Chief of New York and New Jersey, 1701-1708; was removed in 1708, and thrown into prison for debt before he returned to England; made Privy Councillor, 1711, and was Envoy Extraordinary to Hanover in 1714; died in London.

mont, the aristocratic party, now in the minority, took measures to secure the new governor to their own interests. Nicholas Bayard who had been long imprisoned by Leisler, and was instrumental in his death, procured addresses to be signed to the king, to the parliament, and to Cornbury, in which charges of bribery, of public plunder and oppression, were preferred against the lieutenant governor, the chief justice, and the assembly, and reflections were liberally cast upon the memory of Lord Bellamont himself.

Now Bayard had procured a law to be made in 1691, when Leisler and his friends were devoted to ruin, which provided, that whenever any person by any manner of ways, or upon any pretense whatsoever, should endeavor, by force of arms, or otherwise, to disturb the peace of government, he should be deemed a traitor.

The party in power, taking advantage of this law and conscious that their authority and influence would soon be impaired, determined to bring Bayard to immediate trial, before the arrival of the governor, so that he should not be saved by that functionary, who, there was reason to believe, would espouse his cause. Broughton, the attorney general, gave a written opinion, that no crime had been committed, but nevertheless a special court of Oyer and Terminer, consisting of three justices, was immediately erected for the trial of Bayard and one of his adherents. In vain he petitioned that his trial might be delayed until the regular term of the Supreme Court. Five days was the utmost delay he could obtain, and, on the nineteenth of February, 1702, the court assembled to decide his fate.

Broughton, the Attorney General, refused to prosecute, and was not present at the trial, which was conducted by Weaver, the Solicitor General.

When the Grand Jury were called, the prisoner's counsel objected to some of them, for having declared "that if Bayard's neck was made of gold he should be hanged," at the same time boasting that they were of the jury; but the ob-

jection was immediately overruled. A part of the jury insisted that they had a right to deliberate alone, whereupon the Solicitor General took down their names and threatened that he "would cause them to be trounced," and the jury broke up in confusion without acting. The Solicitor General then complained to the court, that four of the jury insisted that he should not be present at their deliberations, and the court ordered them to be forthwith discharged. Still the jury hesitated to find a bill of indictment, and, when they did return one into court, it was immediately objected that the competent number had not voted for it, and it appeared by the statement of eight of the nineteen jurors, that they had not voted in favor of it. But the court decided that the indictment had been regularly returned; it was thus a matter of record, and no averment against it could be received.

The indictment set forth that the prisoner "falsely, maliciously, advisedly, clandestinely, rebelliously and traitorously," used divers indirect practices and endeavors to procure mutiny and desertion among the soldiers and to induce them to sign false and scandalous libels against the government; that his majesty's subjects in the province were oppressed; that the government was rendered cheap and vile in the eyes of the people and that the present General Assembly of the province was not a lawful assembly.

The prisoner and his counsel vainly argued that there was no treason in exercising the right of petition for the redress of grievances. The Chief Justice overruled every point made in the defense and practically forced a verdict of guilty from an unwilling jury. He sentenced him to be hanged, drawn and quartered according to the form of the English penalty for treason at that day.

But the sentence was never carried out, for, when the new Governor of the Colonies arrived, Colonel Bayard was released, and the Chief Justice and his Solicitor General fled to England.

THE TRIAL.[1]

In a Special Court of Oyer and Terminer, New York City, February, 1702.

HON. WILLIAM ATWOOD,[2] *Chief Justice.*
HON. ABRAHAM DEPEYSTER,[3]
HON. ROBERT WALTERS,
} *Judges.*

January 6.

Lieutenant Governor *John Nanfan*[3a] and his council complained of libels against the government in the form of petitions circulated and signed by Colonel Nicholas Bayard and others, and addresses to the King of England, the Parliament and Lord Cornbury, who had succeeded Lord Bellamont as Governor of these Colonies and who was now on his way here.

Attorney General Broughton[4] gave a written opinion that

[1] *Bibliography.* Chandler's American Criminal Trials. See 1, American State Trials, 116; Howell's State Trials (London, 1812), Vol. 14.

[2] ATWOOD, WILLIAM. Born in England; published a large number of controversial pamphlets during last two decades of the Seventeenth Century, and the early years of the Eighteenth; arrived in New York, where he had been appointed Chief Justice and Judge of the Court of Admiralty, August, 1701; suspended from his office by Lord Cornbury and forced to flee from the colony, June, 1702; died 1705. (See 2 Dict. of Nat. Biog.; New York State Library Ann. Rep., 1902; Calendar Council Minutes, 1668-1783.)

[3] DEPEYSTER, ABRAHAM. (1658-1728.) Born and died in New York City; mayor of New York, 1691-1695, and afterwards chief justice of the province; president of the King's Council and acting Governor.

[3a] NANFAN, JOHN. Born Birtsmorton, Worcestershire, England; captain of Sir John Jacob's regiment of infantry; sailed for New York, 1697, where he served as Lieutenant-Governor under Richard Coote, Earl of Bellamont; was Acting Governor from death of Bellamont, 1700, until the arrival of Lord Cornbury, 1701; returned to England, 1705, and died at Greenwich, 1716.

[4] BROUGHTON, SAMPSON SHELTON. Came to New York colony from England, 1701; Attorney General, 1701-1703; member of council of Lord Cornbury, 1702. (See New York State Library Annual Report, 1902; Calendar of Council Minutes, 1668-1783.)

neither the address nor the petitions nor any matter therein contained is criminal and illegal, but nevertheless the Council issued its warrant for the arrest of *Nicholas Bayard* and *John Hutchins* under a recent statute which provided that "whatsoever person or persons, shall by any manner of way, or upon any pretense whatsoever, endeavor, by force of arms or otherwise, to disturb the peace, good and quiet of this, their majesty's government, as it is now established, shall be deemed and esteemed as rebels and traitors unto their majesties and incur the pains, penalties and forfeitures, as the laws of England have for such offense made and provided."

The prisoners were taken into custody and a special Court of Oyer and Terminer was appointed to try them and a Grand Jury summoned to meet on Feb. 19th.

February 19.

Before the grand jurors were sworn, the counsel for the prisoner, Messrs. *Emot*[6] and *Nicholl*,[7] objected against some of them for declaring before several witnesses then ready to be produced in court, "That if Bayard's neck was made of gold he should be hanged;" at the same time boasting that they were of the jury; and prayed that since that jury was summoned upon that special matter such might not be sworn. Which the COURT overruled.

ATWOOD, C. J., gave a long charge to the jury, aggravating the facts supposed against the prisoner, and positively asserting that those facts were treason, not only within the words of this act of assembly, but also by the common law before the statute of the 25th of Edw. 3d.

The jurors having received the charge, the court adjourned till next day.

February 20.

The indictment against Colonel Bayard was delivered by the court to the grand jury; and *Mr. Weaver*[8] (appointed solicitor general

[6] EMOT, JAMES. Petition for land at Staten Island granted, 1694; attorney for Miles Forster, 1696; patent received for land in Duchess County, 1697. See New York State Library. Ann. Report, 1902; Calendar of Council Minutes, 1668-1783; Warren, Harvard Law School, VI.

[7] NICHOLL, WILLIAM. Mentioned as register, 1683; councilor under Governor Bellamont; put under bond for protecting pirates, 1689. See Documentary History of New York, E. B. O'Callaghan, editor, V. II; Warren, Harvard Law School, V. I.

[8] WEAVER, THOMAS. Agent for the provinces, 1699; sworn in as collector and receiver general, 1701; member of Lord Cornbury's council, 1702; solicitor general, 1702; charges of treason were

for the service) attended them with the proofs and insisted to be present with the grand jury, and that no person should be sent for but whom he should name; and that no question should be asked them but such as he should approve of. On the other hand, John Corbitt, Caleb Cooper, John Cortland, and John d'Key insisted that the King's counsel ought not to be present with them at their private debates; and that they had a right to send for what persons and ask for what questions for their information they should think needful. Whereupon, *Mr. Weaver* did threaten them and (to use his own expression), "would cause them to be trounced," taking down their names. And the grand jury broke up without acting.

The COURT in the afternoon met according to adjournment and the grand jury being sent for, *Mr. Weaver* made complaint that he was obstructed by some of the grand jury who would not acquiesce to his being present at the examination of the King's evidence and would have other evidence sent for than what were by him produced. And whereupon ATWOOD, C. J., did discharge the abovesaid four persons from their further service and caused Jacob Boelen, who was absent when the others were sworn, to be sent for from his house, sworn and added to the grand jury; and the court adjourned till seven o'clock that evening, but did not meet until about midnight; when sending to know if the jury had found the bill, and being informed they were separated, he adjourned the court till next morning at eight o'clock; and on the way from the court in passion said, "If the grand jury will not find a bill against Colonel Bayard, I will bring an information against him of high treason and try him upon that."

February 21.

The COURT met, and the grand jury, appearing in court, the indictment was brought in by the foreman, endorsed, *"Billa Vera,"* and signed with his name. Upon which ATWOOD, C. J., immediately discharged the jury.

The Counsel for the prisoner informed the court that the bill was not found by twelve jurors. And upon examination, it appeared to the commissioners that of such of the jurors who remained in court eight of the nineteen were against finding the bill, as appears by the minutes of the court, entered by order: Jacob Boelen, Abraham Kipp, John Van Hoorn, Gerret Van Hoorn, Johannis Van Santa, Wm. Jackson, Burger Myndero, Joan Vanderspiegell. The eight importuned the court that the foreman might be brought upon his oath and the rest sent for to witness the truth that they only found the signing the addresses and not the treason. To which ATWOOD, C. J., made answer they were no longer jurors; they had

preferred against him in 1702; he fled from New York, and a reward was offered for his arrest, but, upon the assurance of protection, he returned and gave bond; the prosecution against him was suspended in 1703. See New York State Library Ann. Report, 1902; Calendar of Council Minutes, 1668-1783.

presented the bill and the court was possessed of it; it was now a record and there is no averment against a record. It was ordered, that the prisoner come to trial on Monday next; to which day the court adjourned accordingly.

March 2.

Mr. Nicholl moved that the indictment might be quashed, not being found by twelve men. The COURT overruled the motion and called on the prisoner, Nicholas Bayard, to plead.

The indictment charged that he, the said Nicholas Bayard, by conspiracy as aforesaid; afterward to-wit, the said tenth day of December last past, in the year aforesaid, in the said city and county of New York aforesaid, and divers other days and times as well before as after, falsely, maliciously, advisedly, clandestinely, rebelliously and traitorously, with force of arms, etc., did use divers indirect practices and endeavors to procure mutiny and desertion among the soldiers in pay belonging to his Majesty's fort and garrison of Fort William Henry, in or near the said city of New York aforesaid, and did draw in numbers of them the said soldiers and others to sign false and scandalous libels against his Majesty's said government, as it is now and has for several years last past been established in this province; which said libels by the procurement of the said Nicholas Bayard, as aforesaid, were signed by the said soldiers and others, and were likewise signed by him the said Nicholas Bayard; in one or more of which said libels amongst other things highly reflecting on the last and present administration of the government under his Majesty in this province it is insinuated and declared that his Majesty's subjects within this province are and have been for some years last past by persons entrusted with the administration of said government under his Majesty, oppressed; and that the said government hath been and is rendered cheap and vile in the eyes of the people as also that the present general assembly of this province is not a lawful assembly. By which and divers other malicious scandals in the said libels contained he, the said Nicholas Bayard hath incited his Majesty's subjects of this province to disown the present authority and government thereof and to cast off their obedience to his Majesty's said government as it now is and hath for several years been established, against the duty of his, the said Nicholas Bayard's allegiance; against the peace of our said sovereign Lord the King that now is, his crown and dignity, as also against the form and effect of one statute or act of general assembly of this province, enacted in the year of our Lord God, 1691, entitled "An act for quieting and settling the disorders that have lately happened within this province and for establishing and securing their Majesties' present government against the like disorders for the future."

Col. Bayard. I plead not guilty and put myself upon God and the country.

The following petty jurors were sworn: Isaac Stoutenburgh, Jacob Vander Spiegell, Andries Marshalk, Gerret Viele, Thomas

Saunders, Jacob Cornelisse, Barent Kool, Goert Olpherto, Samuel Beckman, Cornelius Clopper, Conrael Teneyck, Jacobus Goelet.

The *Prisoner* then read a petition to the court, in which he set forth the injustice and irregularity of the proceedings against him. The indictment, he said, was not agreed to by any twelve of the grand jury, and he prayed that all the members of the grand jury might be examined by the court upon this point. He also insisted, that, as a matter of justice to him, the grand jury ought to have been composed of Englishmen, and of English extraction, of the best character for knowledge, integrity, justice, conscience, and estates; yet there was not a single Englishman on the jury, but all of them were of Dutch extraction and education, and several of them ignorant to that degree, that they could neither read nor write, nor understand the English language. He also complained, that the petit jury was principally composed of Dutchmen, extremely ignorant of the English language. The petition was denied.

The *Solicitor General* made an introductory harangue to the jury, in which he declaimed against the English and French inhabitants of the colony, including the principal Dutch. He charged the prisoner with being the head of a faction, a malignant party, who had endeavored to introduce popery and slavery, "disturbers of our Israel," as they had been of the government of Leisler, which, he said, was now justified at home to be legal. He accused them of being a nest of pirates, betrayers of the prince and his laws, a parcel of banditti, who offered the late Earl of Bellamont a reward of ten thousand pounds to connive at piracies. He avowed himself to be of the Leislerian party, and said he would stand or fall by it. He then detailed the facts he expected to prove.

THE WITNESSES FOR THE PROSECUTION.

Samuel Clows. About a fortnight before Colonel Bayard's commitment, I happened to come to his house about some business, not at all relating to this matter; he asked me, if I had seen the addresses? I answered, no. He then showed me three addresses; the first was to my Lord Cornbury; the persons addressing in it called themselves inhabitants of New York, and others distant from it; and, because some of them could not perhaps be present at his lordship's arrival here, did, by way of address, congratulate his lordship into this government, wishing him all health and prosperity here, and that the name of party might be banished from among us. Colonel Bayard asked me, if I had any thing to say against it? I answered, no, and then signed it. The other two addresses were, one to the king, and the other to the house of commons, or to the parliament, I am not positive which; as I had read them, I remember I made this observation to myself, that they contained nearly both the same things; and in them, or one of them, to the best of my remembrance, were contained these things, the persons addressing, called themselves Englishmen and others, who, though

foreigners, were entitled to the privileges of Englishmen here. It speaks concerning the late revolution here, of which I have but a confused idea, and can remember nothing particular; afterwards it speaks concerning my Lord Bellamont's administration, in several articles, of which I can remember but one, which is, that the hottest and ignorantest of the people were put into places of trust. Then it speaks concerning the late assembly here, and tells you, that after this assembly had chosen a speaker, some of the representatives were informed that he was an alien; upon which they made a motion to the house, that that matter might be inquired into; but that motion being refused, one half of the representatives, or ten of them, left the house; notwithstanding which, the remaining part of the representatives, with some others they took in, did proceed to make acts; in one of which acts they gave a sum of money to the lieutenant governor, to tempt him to pass these acts; and likewise a sum to the chief justice of this province, to find law and form for their proceedings; and, that these things tended to the rendering the government vile and cheap in the eyes of the people.

The *Solicitor General.* What names do you remember you saw to the addresses? I saw several names there; but whether to all three, or two of them, or only to that of my Lord Cornbury, I cannot say; but I did, to the best of my remembrance, see the names of Rip van Dam, Matthew Ling, Charles Wooley, Robert Livingstone, and Mr. Anderson; am not certain whether I saw Mr. Jamison's name there or not. I told Colonel Bayard, they contained things done before my time, and I did not therefore think it proper for me to sign them; upon which he replied, "then do not sign them."

The Solicitor General. I shall read what you said before the council. "Do you not remember that it was said, that my Lord Bellamont had put the most ingenious and honest men of the province out of all places of trust?" "No, I cannot remember that."

"I think you said so before the council." "Perhaps I might say something like it when I was before the council, though I do not believe there is any essential difference between what I now say, and what I said to the council; yet if there be, I hope what I then said will not be taken to my prejudice; I was then sent for by the governor's letters, which seemed to import, that he had business with me of a far different nature than to examine me about this matter; so that I was then in a surprise."

"But you believe what you then spoke was true?" "Without doubt; and I hope Mr. Cosens took care truly to write down what I then delivered; but, whether he did express my meaning right or not, I know not; for I did not look over his notes till the day I saw them at your chamber." "Was not the assembly called an illegal assembly; and that they had made acts prejudicial to the country?" "No, I do not remember that." "Was it not said that the scum of the people were put into all places of trust?" "Perhaps I might before the council use the

word 'scum'; but I now think it was, that the 'hottest' and 'ignorantest' were put into places of trust." "Mr. Clows, pray tell us, what was the reason why you did not sign the other two addresses?" "I think I am not at this time obliged to tell that, as it does not at all affect the matter."

The *Chief Justice.* Yes, but it does; you must tell us. One of the chief reasons was, because I then thought, that the saying the assembly had given a gift to the lieutenant governor, to tempt him to pass their acts, was a reflection upon the liuetenant governor; but it is my judgment now, that it was no reflection at all upon him.

The *Solicitor General.* How! and do you not think so now?

The *Chief Justice.* He only speaks it as his judgment.

The *Solicitor General.* Do you not remember, that the assembly was called "The Pretended Assembly?" No. Do you not remember, it was said, "their illegal proceedings?" Do you not remember the word "illegal?" No, I cannot remember that; and I desired you, at your chamber, to put that word out of the clerk's notes.

The *Prisoner.* Did I ever ask you to sign them? No, you did not; you was so far from doing that, that you rather persuaded me not to sign them; and so did Madam Bayard, who was then in the room.

Mr. Nicholl. Do you remember any thing of the word "oppression" in the address? No, I do not remember that word.

Mr. Nicholl. Was the assembly called an "unlawful assembly?" No, gentlemen; I can speak positively to but few of these things; what I say is, to the best of my remembrance and understanding.

Peter Odyre. Going by Colonel Bayard's house, one Mr. Bodinot told me, I must step in to Colonel Bayard's, and sign an address to the king; and as I was going in, I met Colonel Bayard coming forth of his house; and, going in, I saw the addresses lying on the table. Colonel Bayard then told me, I might sign if I would, or that I might not; and the colonel also told me it was for the good of the country; and that, if I was willing, I might sign them; if not, I might let them alone; and then went away.

W. Richardson. One day drinking at one Spencer's, I was desired to go to the coffee house, which I did; and, when there, I saw a great many people, I believe near a hundred; and, coming above stairs, I saw papers on the table, which were called "addresses," which I signed with others; and I saw, among others, Colonel Bayard there; but he seemed to be no more acting or concerned than any other.

The CHIEF JUSTICE. You are very forgetful of what you swore before the governor and council; but, to put you in mind of somewhat of it, did nobody tell you what papers were to be signed? Nobody at all.

The *Solicitor General.* How many papers did you sign? I signed three, but did not know what they were, but was told they were addresses to the king, and my Lord Cornbury, and the parliament, but did not read any of them; but, I think, one of

them complained, that the people lay under some hardships here.

The *Solicitor General.* You declared much more before the council. I was then called suddenly before the council, and was surprised.

John Bashford. I was at the coffee house, where I saw the papers or addresses, but do not know what they were or contained; and I signed four or five papers there, but did not stay half a quarter of an hour. When I was there, I saw Colonel Bayard amongst many others in the room, but did not see his name, as I remember, to any of the papers.

The CHIEF JUSTICE. These witnesses are very unwilling, or very forgetful, having given a much different account of things upon their oaths before the governor and council.

Bashford. I have now had time to recollect myself, but was then under a surprise, not knowing what I was sent to for.

Hugh Gray. About December last, being at the coffee house I saw on a table some papers which afterwards I understood were addresses to the King, Parliament and Lord Cornbury. Somebody asked me to sign them, which I did accordingly, but do not know who it was; remember Colonel Bayard was there amongst others, smoking a pipe of tobacco; I believe there might then be about ten hands to the papers and about five in the room; I read all the addresses, but cannot now remember the contents of them; do not remember there were any complaints against the government in those addresses.

Mrs. Hannah Hutchins. About Christmas last Col. Bayard brought some papers to my house and left them with me, but bid me show them to my husband who was then at church. These papers remained at my house about three days and then I delivered them to a negro who was sent for them, but do not remember whose negro it was; Col. Bayard was not at our house while the papers lay there.

The *Solicitor General.* Now I shall proceed to prove what sort of people were drawn in to sign these papers.

John Read. Being on 26th of December at Mr. Hutchins' house I saw some papers which one Mr. Burroughs then present asked me to sign telling me they were addresses to the King, Parliament and Lord Cornbury made for the good of the country and which were lying on the bed there; I signed them, but did not read them; did not see Col. Bayard there but believe I saw his name to the papers; saw a great number of names subscribed to the papers, about 200; am about 17 years of age.

Edward Marshal. Going one day about Christmas to the house of Mr. Hutchins I saw there five addresses which I signed, one was to the King, another to the Parliament and another to the Lord Cornbury congratulating his arrival. I read some of them, but found nothing in any of them that reflected upon the governor; there was some complaint of the speaker of the assembly being an alien; saw the name of Edward Marshal before I had signed, but do not know but there may be more Edward Marshals than one in the province; did not see Col. Bayard at

the house nor his name on the papers.

John Buckly. Coming home from the fort and passing by Mr. Hutchins' house I was asked to walk in by Mr. Hutchins, which I did; saw some papers there which were called addresses; but did not read any of them, but that to my Lord Cornbury which, as I understand, was a compliment and congratulation to him at his arrival here. Mr. Hutchins asked me to sign it, but I refused, because being a lieutenant in the garrison I was unwilling to do any such thing before any of my elder officers had done it; did not see Col. Bayard nor his name there.

Francis Cherman. Coming a while ago to Mr. Hutchins' house, and going up stairs, saw certain papers there and some people; Mr. Hutchins asked me to sign those papers, telling me they were addresses to the King and my Lord Cornbury; that they were for the good of the country and the English; and I expected by it to be made free of the city, and signed therefore; did not see Col. Bayard there, nor do I remember the contents of the papers.

One Button. Hearing by some of my fellow soldiers that there were some papers or addresses at Capt. Hutchins', I was willing to go and see what they were, and coming to the house there, I found five papers, and signed them all five, but do not remember to whom they were directed. Capt. Hutchins was there, but said nothing to me at all about the papers or signing them; nor can I remember whether they were in paper or parchment; believe there were then about thirty names subscribed, but saw neither Col. Bayard nor his name there.

Robert Crannel. Some time since I came to Mr. Hutchins', and there found five addresses; I read that to my Lord Cornbury and some of the two others to the king and parliament; in one of them was contained a complaint that the people of this province lay under more hardships than formerly, and that the speaker of the assembly of this province was an alien; saw Col. Bayard's name to that of my Lord Cornbury, but am not acquainted with his handwriting at all; after I had read some part and been told what the rest of the papers were, I signed them all five, but nobody desired or persuaded me to do it.

Mr. Atwood. Your evidence is not so full as when you gave in your information on oath before the council. *Crannel.* But it is and I know nothing more.

One Griggs. I was desired by one Vovell, a soldier in the garrison, to go to Mr. Hutchins' house and sign some papers; was told, and believed it was to make me free of the city; thereupon, I went to Mr. Hutchins' and there signed them, but did not see Col. Bayard there.

One Garnet. A great many of the soldiers of the garrison signed, and they expected thereby to be made free of the city, many of them being tradesmen.

One Fleming. Coming some time since to the house of Mr. Hutchins, I saw there some rolls opened, with a great many names thereto; but did not see any other writing; to this I put my name, and also then put down two or three names for

others at their request, they having first put their marks; I and the others expected by this to be made free of the city; believe, out of 160 men now belonging to the fort or thereabouts, there may be thirty that signed.

One Bovell. Coming to Capt. Hutchins', was shown some papers which was told were addresses, to which I put my mark, without being desired by anybody; cannot write nor read; when I had set my mark, Mr. Hutchins told me that if any of my fellow soldiers would come and sign also, they might; if not, they might let it alone; by this signing, I expected to be made free of the city, but from being a soldier; but never heard Capt. Hutchins say so.

Mr. Cosens. Am clerk of the Council.

Col. Bayard. I own that paper; it is a petition to the lieutenant governor and council in behalf of Alderman Hutchins, then in prison; owning with Mr. French, Mr. Wenham and Mr. Van Dam, that the copies of three addresses to the King, the parliament and the Lord Cornbury, were in our hands.

The *Solicitor General.* I desire Mr. Emot may be sworn, whether he did give advice to a certain person about that clause in the address to the lieutenant governor in favor of Alderman Hutchins, viz., that the Lord Cornbury succeeded the Earl of Bellamont as governor in New York?

Mr. Emot (sworn). I told Mr. French these words in the said address did not run current and might give ground of exception to some who would be apt to strain every word to the prisoner's disadvantage; to which Mr. French replied, they had drawn the addresses themselves and believed it was well enough.

Michael Christian. I remember, some time since, about Christmas, I believe, I was at the coffee house, where I saw the addresses, with many other people, but cannot tell how many; not more than twenty; I found three addresses there, and signed them all, but the substance thereof I cannot now remember; it is a good while since, and therefore I cannot speak positively to it. I remember, a question was asked me at the council, whether there were any complaints in the addresses that the soldiers wanted their pay? I believe I might then answer something about it, but I do not know any such thing in the addresses, either of the soldiers or their pay; I remember that Colonel Bayard was then at the coffee house when I signed the addresses, but do not remember that anybody desired me to sign.

The CHIEF JUSTICE. How many hands, Mr. Christian, did you see to the addresses? I cannot tell how many, but remember Colonel Bayard amongst others was there; but he never asked me to sign either of the addresses; nor can I remember that there was anything concerning either the soldiers or their pay in the addresses.

The CHIEF JUSTICE. Certainly these gentlemen are very unwilling evidences; Mr. Christian is a gentleman of good learning, and it is strange that he should be so forgetful, that he cannot remember what was given in on his oath before the governor and council; he has either a weak or a treacherous memory.

The *Solicitor General.* I have now proved by the witnesses those false and scandalous libels set forth in the indictment, whereby the good, peace and quiet of the government has been disturbed, which by this act of assembly is high treason. I have likewise proved, that the soldiers were drawn in to sign those scandalous libels, and that some did sign blank rolls, which was listing of soldiers, and is treason. These words in the petition to the lieutenant governor and council, viz. "who we understand, by certain advice we have received from England, to be nominated by his majesty to succeed the late Earl of Bellamont as our governor," are a disowning and casting off the present authority, and his majesty's government.

Mr. Nicholl. Your Honor and the jury will please to take notice, that the indictment consists of divers heads; as, that the prisoner did compass, imagine, contrive, propose and design to defame the peace, good and quiet of this his majesty's government; that he used divers indirect practices and endeavors to procure mutiny and sedition among the soldiers; that he drew in numbers of them, the said soldiers and others, to sign false and scandalous libels, and that he had signed them himself; that in these libels it is declared, that the subjects in this province are and have been for many years last past, by those entrusted in the administration of the government, oppressed; and that the government hath been, and is rendered cheap and vile in the eyes of the people; as, also, that the General Assembly of this province is not a lawful assembly; by which means he hath incited his majesty's subjects to cast off their obedience to his majesty's said government.

The prisoner is not directly charged here with any fact, except his own signing the said libels, but for endeavors; the rest are forced conclusions and strained inferences drawn from thence. It is not alleged, that the peace of the government has been disturbed, or that any mutiny or sedition has been amongst the soldiers, or that any one of his majesty's subjects has cast off his obedience to his majesty's said govern-

ment. By the course of the evidence, it appears, there was an address to the king, an address to the house of commons, and an address to my Lord Cornbury, and a petition or address to the lieutenant governor and council; but all the evidence is very lame and weak, as to the three first, if we should admit the making or signing of them to be any fault or crime, more especially if the same should amount to treason; for by none of the evidence does it appear that the prisoner signed these addresses; here is not so much as the likeness or comparison of hands produced, alleged, or proved, though if it were, that would not do.

But I shall not dwell upon the evidence; it is certainly the right of the subject to petition the king, whenever he conceives himself aggrieved. In the Bishops' trial, Mr. Pollexfen says, "I never thought it, nor hath it since been thought by any body else, to be a crime to petition the king." Sergeant Levinz affirms, "the subjects have a right of petitioning the king in all their grievances." So say all our books of law; so says the statute of the 13th of Charles II; they may petition. Sir Thomas Powys, then attorney general, acknowledges that access to the king by petition is open to every body; the most inferior person is allowed to petition the king. Mr. Justice Holloway says, "it is the birthright of the subject to petition the king." If it is the birthright of the subject to petition the king, to procure or draw in men to do what is their birthright to do can never amount to a crime.

The CHIEF JUSTICE. I do not say petitioning the king is a crime, but it may be to petition the House of Commons in the plantations, where the king governs by prerogative.

Mr. Nicholl. I cannot think it is a crime for the subjects of the plantations to petition the House of Commons; it is every day's practice. Consult the votes in every session, you will find many addresses, petitions, and complaints from the subjects of the plantations. It seems to be the right of the subjects to petition the House of Commons. The statute of the 13th of Charles II, chap. 5, restrains the common law;

by that it plainly appears to be the right of the subject to petition the House of Commons, or the king. The proviso in that act says, "that neither that act, nor anything therein contained, shall be construed to extend or hinder any person or persons, not exceeding the number of ten, to present any public or private grievance or complaint to any member of the House of Commons after his election, or to the king's majesty." By the act of recognition of William and Mary, declaring the rights and liberties of the subjects, and settling the succession of the crown, it is enacted, amongst other things "that it is the right of the subject to petition the king; and all commitments and prosecutions for such petitioning are illegal." And they do claim, demand, and insist, upon all and singular the premises, as their undoubted rights and liberties; and that no declaration, judgment, doings or proceedings, to the prejudice of the people, in any the said premises, ought in any wise hereafter to be drawn into consequence or example. Here is no grant of any new privilege, but a claim and acknowledgment of an ancient right; and petitions to the parliament are as ancient as parliaments themselves. If the subjects of the plantations may not petition and complain to their prince, they are in a worse condition than slaves. The cries of the oppressions in the plantations have gone up to heaven, and are again come down upon the earth, and have inspired and moved the king and Parliament of England to make a law to check the exorbitant actions of governors in the plantations, and make them accountable in England for their miscarriages abroad; which can never be discovered to the king but by petition.[1]

This prosecution seems to be made to frustrate and evade this act of Parliament. The subject is oppressed, or conceives himself to be so, and complains of this oppression; this

[1] This act provided that if any governor of any colony should be guilty of oppressing his majesty's subjects beyond the seas, or should be guilty of any other crime or offense, the same should be inquired of by the court of king's bench in England, and such punishments inflicted as were usually inflicted for offenses of a like nature committed in England.

complaining is made treason! Here is a strange and fatal dilemma on the subjects of the plantations. They must either suffer their oppressions, or be hanged for traitors if they complain.

The act of assembly of this country can by no natural or legal construction be extended to make the prisoner culpable. It is plain by the whole purport of the act, that it has made no new treason; it only recognizes the king and queen; and enacts, that those who shall do any thing desructive to that establishment, by force of arms or otherwise, shall be rebels and traitors; which they would be without this act. If this address and petition had been to the French king, the thing had been of another nature. By the same construction, every petty battery, or other little trespass, may be a treason.

The petition of Colonel Bayard and the other three is so far from disowning the government, that it is a direct acknowledging of the same. The direction of the petition is, to the lieutenant governor and the council. The expression "that they have advice that Lord Cornbury is to succeed the Earl of Bellamont" can with no justice or common sense be construed to be a disowning and casting off of the government.[2] I think it will hardly be affirmed, that the council succeeded the Earl of Bellamont, and Captain Nanfan the council; if so, after the Earl of Bellamont, who was captain general? We had seven captains-general which is an absurdity, I suppose, none will allege. A familiar example will demonstrate the weakness and falsity of this construction. If a captain of a company be killed or absent, the lieutenant or next officer has the full command of the company, as the captain had, or could have; but I think no man will say he succeeds the captain, or that when another captain is appointed he succeeds that lieutenant or other officer. So that I cannot think there is any fact or crime alleged or proved against the prisoner, to charge him with this high crime of treason, or indeed with any other crime whatsoever.

[2] Some time after the Earl of Bellamont's death, Captain Nanfan, the lieutenant governor, was at Barbadoes.

Mr. Emot. By Your Honor's permission, I am of counsel for Colonel Bayard, the prisoner at the bar; but by reason I am unwilling to spend too much of your time, this trial already having been very long; and Mr. Nicholl, who is also of the counsel on the same side, having amongst other things made it very evident, that for the subjects to petition his majesty is their ancient and indubitable right; I shall therefore make it my business only, as near as I can, to demonstrate to this court and jury, that had the king's counsel made ample proof that all the matters of fact alleged in the indictment, as the signing the addresses, and other things therein contained, were true; yet, in point of law, they cannot amount to that grand crime of high treason.

He then made an elaborate, learned, and able argument upon the law of treason, in which he examined all the authorities upon the subject, and exposed with great clearness and force, the absurdity of supposing the acts of the prisoner to constitute the grave crime of high treason. He then commented upon the act of the assembly, arguing that it had no relation to a case like this; and contended, in conclusion, that the jury were judges of law and fact. Matters of law, he admitted, were the most common and proper objects for the determination of the judges, yet as law arose out of and was interwoven and complicated with fact, it could not but fail under the jury's consideration.

The Prisoner. I desire some of my evidence may be called to give an account of my life and conversation. (Which was granted.)

Mr. Vesey. Am minister of Trinity church; have been for six years personally acquainted with Col. Bayard; during which time his life and conversation recommended him in the world as an exemplary christian; and the frequent expressions of his zeal and affection to his majesty's person and government convinced me that he was a good subject.

Capt. Tudor. Have known Col. Bayard 26 years; a moderate, civil, good man; has been employed in almost all offices of the greatest trust in the government; never disaffected, but stood up for the Protestant religion and King William.

The Prisoner. To prove that I have upon sundry emergencies, during the late war, advanced of my private fortune

upon loan, without interest, several considerable sums of money for the preservation of his majesty's interest and government in New York, of which upwards of 2001. money in specie lent, is still unpaid. I desire, Mr. Jamison (who was then clerk of the council) may be sworn.

ATWOOD, C. J. Mr. Jamison has refused to purge himself of signing those addresses and is *particeps criminis*, for which reason he cannot be allowed to be an evidence.

The CHIEF JUSTICE charged the jury. The indictment he said was founded upon the act of the assembly of New York, confirmed by his majesty, which had power to make acts of treason as well as Parliament. The right of petitioning the king was not in dispute, but the manner of doing it made it criminal. It was perfectly plain, that the addresses of the prisoner was a disowning of the present authority, and a casting off his majesty's government as it was then established. The drawing in of soldiers to sign petitions was mutiny and sedition by the law; and drawing them in on false pretenses, in hopes of freedom in the city, and subscribing their names on blank lists, was enlisting soldiers, and might be applied to invite in any foreign power. In conclusion, he strenously insisted that the facts laid in the indictment were abundantly proved, and constituted the offense of high treason, and therefore, the jury could do no otherwise than find the prisoner guilty.

THE VERDICT.

The *Jury* retired, but had not agreed at 9 o'clock in the evening.

March 9.

The *Jury* had not then agreed upon a verdict, but requested further instructions. The CHIEF JUSTICE proceeded to give them, and said he had received letters from the jury, and answered them, which answers were only his private opinion. He sad if they were under any difficulty, whether the matters of fact alleged in the indictment, and which were proved to them, were treason or not, they might find the prisoner

guilty; who had his advantage in moving in arrest of judgment, and might be relieved as to matter of law.

Mr. Emot. This is not fair, to give the jury a handle to find the prisoner guilty, in expectation of relief in arrest of judgment; for they are judges both of law and fact, as the case is now circumstanced; if they will enslave themselves and their posterity, and debar themselves of all access to their prince, they will be worse than negroes.

The CHIEF JUSTICE. This is not to be suffered, to offer these things to the jury after they have received their charge; therefore be silent. Then proceeding, he renewed his charge to the jury, aggravating the supposed crimes for the space of about half an hour.

Mr. Emot. I pray Your Honor to be heard one word. (This request he often repeated, and, at last, it was granted him.) The facts laid in the indictment were not proved, as to the disowning and casting off the government, encouraging of mutiny in the soldiers, or disquieting the peace of the government. Addressing the king is the undoubted right of the subject, both by common law and acts of Parliament. If the subject, for complaining of grievances, set forth by petition, is to be attainted of high treason, we are in a worse condition than slaves.

The CHIEF JUSTICE checked him, and commanded silence.

Mr. Nicholl. The act of Parliament to punish governors in the plantations for oppressing the subject, is rendered useless and of no effect, if the subjects are deprived of the liberty to complain, and set forth their grievances, by petition to their king.

The *Jury* again retired and brought in a verdict of *guilty*.

THE SENTENCE.

March 10.

The Prisoner's Counsel moved in arrest of judgment for several reasons, the principal of which was that no act of treason had been committed. These points were argued at great length, but were all overruled by the COURT.

The prisoner made an urgent appeal in a letter addressed to De Peyster, one of his judges, in which he says:

"Believe me, sir, as you may give credit to the words of a dying man, I die with a clear and good conscience, and as free of that horrid crime laid to my charge as the child yet unborn; and therefore hope God's merciful hand, who has never left nor forsaken me, will continue to support me to the very last, and that I may look death in the face, as a good christian ought to do; humbly submitting my all to his most wise, most just, and most merciful dispensations; for I am sensible there is no more than one death for me, and that, in all probability, considering my age, it might have been very soon, though this tribulation had not befallen me. I shall only add, that I hope in God's mercy for the pardon of all my manifold sins and transgressions, through the only merits of my saviour Jesus Christ; and that when I shall be no more, he will continue his grace to my dear wife, and my posterity; and, lastly, that my blood, which is struck at (by your brother's own expressions to myself, and your brother-in-law's to others, both not long since), may be the last to be spilt on account of our dismal and unhappy divisions; though I fear that out of my ashes such further calamities may arise to this poor bleeding province, as posterity will have cause long to lament; for it is not to be expected, that all the plots, contrivances and intrigues used in this matter (many of which, I assure you, are already discovered), will have their end with myself; it had been more pardonable to have stabbed me in my sleep, or with Joab's hand, under a pretence of friendship, than to do it with Ahab's under a color and cloak of justice; and of the two, I leave others to consider, if this latter exceeds not the former; since it is not to be supposed, that Ahab's was so much out of malice; but the vineyard being denied him on his offering the worth of it in money, occasioned the innocent to be arraigned and slain for a pretended crime of blasphemy and high treason."

March 16.

The Prisoner made a petition to the court, in which he set forth the irregularity of the proceedings against him; first, that the indictment was not returned by twelve of the grand jury; second, that the petit jury were all prejudiced against him on account of the unhappy divisions in the province, and they were extremely ignorant of the English language, scarcely one of them being able to say the Lord's prayer in the English language; that there was no proof of the signing or encouraging others to sign the petitions, and that the petitions contained nothing treasonable.

The COURT overruled the plea and said, "*Col. Bayard,*

have you any thing to say why sentence should not be pronounced?"

The *Prisoner.* I have nothing more to offer, than what my counsel have offered, and what is contained in my last petition.

The CHIEF JUSTICE. I am sorry to find you so impenitent of your crime, which is so heinous and abominable in the sight of God and man. You have lately made reflections upon the proceedings of this court against you as if it had been a design to do the job; comparing your case to that of Naboth's vineyard. But I hope God will open your eyes, that you may be convinced, and repent of the crime.

It is considered by the court here, that you be carried to the place from whence you came; that from thence you be drawn upon an hurdle to the place of execution; that there you be hanged by the neck, and being alive you be cut down upon the earth, and that your bowels be taken out of your belly, and your privy members be cut off, and you being alive they be burnt before your face; and that your head be cut off, and that your body be divided into four quarters; and that your head and quarters be placed where our lord the king shall assign. And the Lord have mercy upon your soul.

The Prisoner. I desire to know whether I have leave to answer Your Honor's speech, made before sentence?

The CHIEF JUSTICE. No.

The Prisoner. Then God's will be done.

The sentence was not carried into execution. Applying for a reprieve until the pleasure of the king might be known, it was granted to him, and, on the arrival of Lord Cornbury, he was released. All was then reversed. Atwood, the chief justice, and Weaver, the solicitor general, fled to England. Bayard was reinstated in all honor and estate, by public command, "as if no such trial had been."

THE TRIAL OF ORRIN DE WOLF FOR THE MURDER OF WILLIAM STILES. WORCESTER, MASSACHUSETTS, 1845.

THE NARRATIVE.

William Stiles, a deformed and feeble man, married to a good-looking wife, was lazy and given to intemperance. He had a small property which on account of his habits had been placed in the hands of trustees and it would go to his wife at his death. She was not fond of him and told this more than once to a boarder named De Wolf. One night Stiles proposed to the boarder that they should go for a spree and the latter hired a sleigh and they drove together to a tavern in the country where Stiles got very drunk. When they returned to the livery-stable, De Wolf told the people there that Stiles was dead drunk and they helped to carry him upstairs. When a physician was called he pronounced him dead. On the theory that De Wolf had strangled him in the sleigh, he was tried and convicted of murder.

THE TRIAL.[1]

In the Supreme Judicial Court, Worcester, Massachusetts, June, 1845.

HON. LEMUEL SHAW,[2] *Chief Justice.*
HON. SAMUEL WILDE,[3]
HON. CHARLES A. DEWEY,[4]
} *Judges.*

[1] *Bibliography.* "Warning to the Young. Trial of Orrin De Wolf, for the murder of Wm. Stiles, at Worcester, January 14, 1845. Including his confession, showing the natural results of intemperance and licentiousness. Worcester: Published by Thomas Drew, Jr., 136 Hanover Street, Boston, 1845."

[2] See 1 Am. St. Tr. 443.

[3] See 4 Am. St. Tr. 99.

[4] See 4 Am. St. Tr. 99.

June 10.

Today began the trial of Orrin De Wolf. The first count of the indictment charged the prisoner with committing a felonious assault on William Stiles, at Worcester, on the fourteenth of January last, and producing the death of said Stiles by strangling him with a silk handkerchief. The second and third counts alleged as the cause of his death, a large quantity of a noxious ingredient, called first-proof gin administered by the said De Wolf to the said Stiles.

Mr. Wilkinson,[5] District Attorney, said that it would be probably shown that death was occasioned by strangling, and therefore, the government would rely wholly upon the first count. The prisoner having previously pleaded not *guilty,* his defense was assigned by the COURT to *B. F. Thomas*[6] and *A. H. Bullock.*[7]

The following composed the jury, which was sworn: Abra-

[5] WILKINSON, EZRA. (1805-1882.) Born, Attleboro, Mass.; received early education at Day's Academy; graduated, Brown University (A. B., A. M.), 1824; from 1824-1826, was principal of Monmouth College, Maine; studied law with Peter Pratt in Providence, R. I., and with Josiah J. Fiske, in Wrentham, Mass.; admitted to Bar Dedham, Mass., 1828; after practicing short time in Freetown, Mass., and Seekonk, Mass., removed to Dedham, where he remained until death; from 1843-1855, served as District Attorney of the Middle District; in 1843, the office of Attorney General was abolished and not renewed until 1849, during which interval Wilkinson conducted ten capital trials; member of Massachusetts House of Representatives, 1848-1849, 1851-1852, 1856-1857; member of Constitutional Convention, 1853; was one of judges appointed to the bench of the Superior Court at its establishment in 1859, continuing on the bench until his death, at Dedham, Mass.; was a member of Phi Beta Kappa. See Davis, William T., Bench and Bar of Massachusetts, 1895, Vol. 1; Historical Catalogue of Brown University (1764-1914), 1914.

[6] THOMAS, BENJAMIN FRANKLIN. (1813-1878.) Born Boston; member of Congress, 1861-1863; Justice Supreme Court of Massachusetts, 1853-1859; author of many legal treatises; died Salem, Mass.

[7] BULLOCK, ALEXANDER HAMILTON. (1816-1882.) Born Royalston, Mass.; member of Massachusetts Legislature and Senate for several terms; Commissioner of Insolvency, 1853; Judge of Insolvency, 1855-1858; Mayor of Worcester, 1859; Governor of Massachusetts, 1866-1870; died in Worcester.

ham Haskell, foreman; Holland Albee, Gilbert Bond, Joel Barnard, Zalmon Bellows, Salem Cobb, Charles Cutler, Franklin M. Farnum, Ephraim Fisher, Lincoln Fay, Wilcott Harwood, Emerson Johnson.

THE WITNESSES FOR THE COMMONWEALTH.

Benjamin Baldwin. Reside in Worcester—tend stable for Flagg & Dodd, hotel-keepers—Mr. Whipple's stable adjoins the hotel. I remember the death of William Stiles. De Wolf called me as I was coming from Flagg & Dodd's stable to the house, and said he had Stiles drunk in his sleigh; asked me to help get him up stairs in Whipple's stable, and laid him on a cot bed that was there. This was about 10 at night. Stiles said nothing, seemed perfectly helpless; staid about five minutes; Mr. Samuel Stone was at the stable with De Wolf; I remained there but a few moments; Stiles was on the bed; he said several times, he wanted to go home. De Wolf told him he should go home soon. I went back to the house and went to bed in a short time; De Wolf told me about 12 o'clock, that Stiles was dead; he said they had been to Bartlett's and Cobleigh's.

Cross-examined. It was the practice of De Wolf to lie down on the bed when people were out late; the room was warm when I was there.

Samuel Stone. Was kitchen-colonel at Flagg & Dodd's January last. De Wolf said about 5 on the afternoon of Stiles' death, that he had got to go away and would like me to take care of the stable; he went away about 6 o'clock; a little after 10 De Wolf came to the bar room and took the lantern and key to get into the stable; he said he saw Stiles drunk in the sleigh and asked me if I would go down and help him, said I couldn't go just then. In a few minutes I went to the stable. Stiles lay on his back in the bunk, with a buffalo doubled up under his head. De Wolf sat in a chair; I staid about half an hour. About ten minutes after I went in, Stiles said his hands were cold and he wanted his mittens put on. De Wolf got up and put them on for him. Stiles said he wanted to go home. De Wolf said, "be quiet a little while and you'll feel better, and then I'll take you home." Stiles said he had lost a good deal of money by one person and another. De Wolf said, "you haven't lost any thing by me, have you?" Stiles said, "yes, I have lost a good deal by you." I staid three or four minutes after Baldwin went out. Stiles tried to get up while I was there, but couldn't—would raise himself about half way and then fall back. Baldwin told me in the morning that Stiles was dead. De Wolf carried the scholars to school in the morning, and said he was going to see Stiles. I went with him. About five minutes after we got there, De Wolf and Mrs. Stiles went into a kind of closet and shut the door and conversed together. They staid about five minutes, then I came away. I saw Stiles on a bed in

a room at the left as I went in. This was a little after nine in the morning.

Rodolphus C. Edwards. Was at Flagg & Dodd's tavern the night of Stiles' death; saw De Wolf about half past ten in the bar room. He said there was a man at the barn drunk, and he wanted some salt and water to give him. De Wolf, myself, Nathaniel Watson, and a man from Boston went out together. We found Stiles lying on a cot bed. De Wolf went for Dr. Heywood, and he came in about ten minutes after us. De Wolf told us before Dr. Heywood came, that he had been with Stiles to Bartlett's and Cobleigh's, that Stiles drank once at Bartlett's and twice at Cobleigh's; noticed a red streak on one side of Stiles' neck; Stiles was still warm.

Nathaniel Watson. Was at Flagg & Dodd's the evening of Stiles' death; went to the stable with Mr. Edwards, Mr. Mason and De Wolf; thought Stiles was dead when we first went in; De Wolf stepped to the bed and was going to give him some salt and water he had in a dish. In a very few minutes he went for the doctor.

Alfred P. Bartlett. Saw Stiles about twelve o'clock at Whipple's; had hired a horse to go to Holden, and returned about twelve o'clock at night; found no one in the stable, and went up stairs to call the hostler; saw a man lying on the bunk, called to him, and shook him, but received no answer; saw that he was dead —thought he died in a fit. I saw a red streak about his neck, which frightened me. In a few minutes Mr. Matthews and Mr. Hillman came from the east, and soon after De Wolf came from the same direction; asked who the man was—De Wolf said Mr. Stiles. I asked what Stiles—Mr. Matthews said, "the humpbacked man." I asked what the matter was—De Wolf said the doctor supposed he was chilled through; asked where he found him—he said he found him in the yard by the side of a sleigh, with his hat in one place, and his coat in another. Mr. Matthews asked if he gave him anything—he said, nothing but some salt and water.

Dr. Benjamin F. Heywood. Reside in Worcester—have been a practicing physician about 30 years. De Wolf called me to see Stiles late in the evening of 14th January last; said there was a man dead at Fessenden's tavern; told him if he was dead there was no use in my going to see him. He said he didn't know whether he was dead or not; asked him who it was; he said Mr. Stiles, that he found him in the street—he didn't know whether he died by intoxication or was frozen to death. I dressed myself and went down—about eleven by the clock on the stairs. I found Stiles; he had a curvature of the spine; felt of his pulse and heart, and made sufficient examination to ascertain that he was dead. De Wolf showed a silk handkerchief which he said he had taken from Stiles' neck, because it was so tight he didn't know but it would choke him. He asked what he should do with the body, and said, "I don't want it here." I told him he should go for a coroner, and he would do what was necessary; told him Timothy Bancroft was a coroner, and he rode away, but soon re-

turned without finding him: I then told him to go for Mr. Gates, the sexton, as he would know what should be done; noticed a little redness about the throat, but made no particular examination at that time. After the jury of inquest was summoned, made a post-mortem examination in company with Dr. Green and my son. On the back of the neck, the blood had settled as is usual after death, in front of the neck the red mark was very distinct. Whatever had been applied to produce stricture, was evidently removed before the capillary circulation had entirely stopped. When a ligature is applied constantly, as in hanging, the skin has a dry, bloodless appearance, somewhat like parchment. The neck was very short, and the windpipe, from the curvature of the spine, was crooked. We found no ecchymosis (effusion of blood) beneath the cellular substance, but at a subsequent examination we found ecchymosis in one place in the muscle. The second examination was made to ascertain whether the cartilages of the trachea were broken. In the stomach there was no trace of inflammation or poison. The lungs were somewhat engorged with blood, but no more than is frequently observed. In removing the cranium, the saw went into the brain, and an unusually large quantity of black venous blood flowed out. The veins and arteries of the brain were surcharged with dark blood; at least 8 ozs. of blood in the vessels of the brain. There was no appearance of effusion from the vessels of the brain, nor of lesion, as in ordinary apoplexy; was satisfied from my examination, that the ligature about the neck was sufficient to check respiration, but arterial action continued to some extent afterwards, and the brain was therefore charged to repletion with venous blood; should say that the cause of death was apoplexy resulting from strangulation. In apoplexy from liquor, the blood in the arteries would not be so dark colored. A person dying from the effects of ardent spirits, would not be able to speak after he was perfectly under the influence of it.

Dr. John Green. Have been a practicing physician in Worcester nearly 40 years; made a post-mortem examination of Stiles, in company with Dr. Heywood and son, about forty hours after Stiles' death; we found no external marks of violence but a deep pink stripe, extending from the front of the neck to just back of the ears, on each side. It had the appearance of being caused by some ligature—could not have been a cord, but something soft, like a silk handkerchief slightly twisted. There were no traces of poison in the stomach—the food was partly digested. The brain appeared healthy. The veins and even the arteries, were full of very dark blood—at least three gills. I think that death arose from apoplexy, caused by the ligature about the neck. I do not think a person could apply sufficient force to strangle himself in this way.

John Gates. Saw Stiles about twenty minutes past twelve, on the morning of January 15th, lying on a bunk in Mr. Whipple's harness room. I found Mr. Matthews and his turnkey there

—did not particularly note Stiles' appearance. De Wolf and myself carried him down, put him in a sleigh, and carried him home. De Wolf shaved him. After we had taken off the clothes, observed for the first time the mark around the neck. When De Wolf came to my house, he said there was a man at the stable, dead—that he found him in the road by a sleigh, and Dr. Heywood said he was chilled through—he was intoxicated, and in the habit of getting intoxicated. While we were going to the stable, he said "you won't catch me taking up another man in this way." I asked him why—he said "by his dying on my hands, people may think all is not right." I told him it was the duty of every man if he found another in trouble to take care of him—but the thought he shouldn't take up another in that situation when he was alone.

Oliver B. Webber. Worked for Stiles in August last digging a well. De Wolf came a number of times and asked if I thought I should get water—wanted I should persevere for 'twould be a benefit to Mr. Stiles, and he didn't know but it would be to him. He said he had got part of Stiles' property and thought he should have the rest in a year or so—he asked me if I thought Stiles would live a year. I told him I didn't know but he was as likely to live, as either he or I—he thought he wasn't, as he was rather a feeble man.

James Pierce. Saw De Wolf frequently in the course of last summer. In July or August, De Wolf said, I shall have more money within a year than I have now. I asked where he was going to get it—he asked if I knew Humpy Stiles. I asked if he was the man that put him in jail—he said he was, and he should have his property within a year; asked how much he would have—he said six, seven, or eight hundred dollars. I asked if he was a connection—he said no—if he had a wife—he said yes, but there was an understanding between her and him; asked if he was going to kill him, he said no, but he would die himself within a year.

Charles Gates. Lived at Flagg & Dodd's in January last; saw De Wolf between ten and eleven on the evening of Stiles' death—he said Mr. Stiles came to the stable about six o'clock that evening, and hired him to carry him out to (Bartlett's) tavern, after they got to the tavern Stiles drank twice, they then went to old Cobleigh's and staid there about half an hour—Stiles drank twice while there—they then came home; did not hear of Stiles' death till the next morning. De Wolf told me little Humpy Stiles was dead.

Asa Matthews. Am a coroner—was called to visit the body of Stiles on the night of the 14th of January about 12 o'clock—went with my turnkey; found the body lying on a cot bed with a buffalo under it. A large red silk handkerchief was loosely tied about the neck, an old black silk handkerchief was rolled up under the right side of the neck, which De Wolf said he took off; asked De Wolf when he found him and how he came there. He said he found him in the fore part of the evening, down by the corner of the barn, beside an old sleigh; said he heard a noise and went out and found him, he ap-

peared to be slewed and cold; asked if he knew where he had been that evening—he said, no—if he knew where he got his liquor—said he did not. He said he was acquainted with him, and had boarded in his family. When he found him he was the worse for liquor, and and he got the hostler to help carry him up, and laid him on the bunk—he then took a newspaper and sat down and read, until he fell asleep—when he woke up, he went to the bed and found Stiles almost dead, he then went to the tavern and called two men and then went for Dr. Heywood. Dr. Heywood came, examined the body, and told him he had better send for the coroner; told him I did not think it necessary to summon a jury, and told Mr. Gates he had better take the body home and lay it out. Towards night the next day, I was induced by reports to have De Wolf arrested. The next morning the body was examined; noticed a stripe round the neck, and quite a large mark back of the left ear, that looked as if the blood had settled. I have two letters with me, that De Wolf has written since he has been in jail. One he directed to Chatman Warren was brought out by my turnkey, the other was taken from a man who was discharged on the 24th of February—both are dated Feb. 23. [The letters were both produced and read by the District Attorney.[8]] I told De Wolf I had taken the letter away—he said he was very sorry.

Previous to these letters De Wolf had frequently said that it was a hard case for him to be shut up there,—that he was as innocent as I was. I told him,

Worcester, Feb. the 23, 1845.

[8] Mr. Tucker. I take it at this time to tell you that I have got myself in great trouble and I don't know how that I shall get out of it, but I don't know that they will hang me, but I think that I shall have to go to States prison, and if I do I shall stand a chance to get pardoned out, but there ain't anything that will save me but one thing.

I want you to tell Mrs. Stiles that I write this as a friend to her. Mr. Matthews come and told me that they was a going to take her and put her in here, and they had put a guardian over Mr. Edward and was a going to take him from it. He said that they could prove that she had said that she should be glad if could get any body to kill him, and they could prove, that she and I had been contriving to kill him for five months back by the neighbors, and he said that she and I had been seen together for when William went down on to the street that was around the house and heard what we said, and he told me some things as it was, and I don't expect that I can get rid of it for some have told things that I never knew of about me, and there is many against me that I can't escape and now I want she should go clear, but if she can't, and I think she better get some man to see to her things and go where they can't find her. But she had better not take Edward with her for they won't be so apt to find her. Now I do this so to give her warning

if he was, I didn't think he would be hurt. After a while he said he could tell me more about it, if I would promise to say nothing about it, and asked if I thought he would be clear, if he could tell who did murder him. I told him I could tell nothing about it without I knew what he could tell; but I should advise him not to say any thing that would convict himself in any way whatever,—that if he was perfectly innocent and could bring light who did do it, I thought it was his duty to do so and 'twould be a benefit to him. He wanted to know if he told me these things, whether I should have to state them if I was called in court. I told him that if I promised not to state any things, I thought the court would not compel me to state them. He

so that she can get out of the way for if she don't they will have her, and now if you know where she is you be sure to help her out of the way tell her that to leave her things and to have you see to them and to keep my things with hers, and if I don't get out do what she has a mind to with them. But I don't want to have her brought to trouble and if she don't get secreted they will have her. Tell her not to think any thing about her property but to save her own life for she can get her things some way, but to get out of the way. They tell me that there is but one thing that will save my neck, only to tell the whole story for they could prove that she and I was knowing to it and if I do I want she should get out of the way first. But I shant own any thing yet. I can't write any more for I hain't got any paper, so good-bye. Orrin De Wolf.

Worcester, Feb. 23d, 1845.

Mr. Warren, Sir:—I take my pen in hand to write a few lines to let you know that I am in trouble, and I want you to come and see me, for I don't know that I ever shall see you if you don't come. I have got into the County House I don't know that I shall be able to get out very soon, but I hope I shall by the mercy of God, for I was flattered up to it although I didn't kill him, but I was at blame about it for I told the one that did do it, I wished that he had liquor enough to down him to kill him, and I was owing him fifty dollars at that time; and I said that I won't grudge that, if any one would kill him, and she was—

And I don't think I shall get off without going to the gallows, or to State Prison, but I hope that I shall be prepared for it, let it come as it will.

I hope that you will come and see me if you can, you must give my love to all the folks up there I am well at this time, and I hope that you are all well, and I want you to tell ———that I send my love to him, and be careful what company he gets into, for if he don't he will come where I have come, to the gallows; but I am not so much to blame as some others are. But I shall tell the whole of it, and if they think that I had ought to be hung they will do it. But come and see me if you can. Good-bye, this from

Orrin De Wolf.

Chatman Warren.

then said that there were others concerned in it, and others did it, but he was perfectly innocent,—said he hired another man to do it. [The *prisoner's counsel* objected. The COURT decided that it might be received unless it could be shown that the prisoner was influenced by hope or fear, to make the statement he did.] Have frequently been into De Wolf's cell for the purpose of having conversation with him, at his request; never told him that the best thing he could do would be to make a confession,—the most I ever said, to encourage him to confess, was that if he was perfectly innocent, as he said he was, and if he knew who was guilty, he had better tell; may have said that I thought there was another person more to blame than he was,—said I thought there was another man knew more about it than had come out. De Wolf asked me what I thought would be the result,—if I thought the District Attorney would come up and let him out; told him no, I didn't think what he had disclosed would amount to any thing. De Wolf first asked me into his cell about 1st of February. He said Mr. Stone was in the room with him, and Stiles was swearing and telling him he had cheated him out of $50. He told Stone he wished the d——d rascal had liquor enough down his throat to kill him,—Stone said it wouldn't be much of a job to kill him,—he told Stone he owed Stiles $50, and if he would kill him, he would give him that,—Stone said, for the $50 he would kill him. He said he then went down, and Stone put his hand in Stiles' handkerchief, behind his neck and choked him, and then came down and said he was dead enough, he guessed. He then went up and saw Stiles dead,—then went to the tavern and called two men,—and went for the doctor. Stiles' wife knew nothing about it; told him I didn't believe his story, but I had thought of a way to test the truth of it, if he would consent to it. He wanted to know what it was; told him I would have Stone arrested that evening as accessary to the murder, and put in the cell adjoining, and after all was still in the house, he should commence a conversation with Stone, which I could overhear. He said he couldn't do that, because things would come out against him that would make his case a great deal worse than it now was. I asked him how that could be, if he had told the truth,—he said, "a man in my situation would tell most any thing, to save his own life." After De Wolf knew I had the letter to Mr. Tucker, he said he had bought poison once or twice for Mrs. Stiles to use, but he didn't know whether she had used it or not,—he bought some to carry with him, the night that Stiles died. Mrs. Stiles told him to get some and put it in hot sling, and that would send it all over him, so he couldn't throw it off,—said he did not use the poison, because he didn't see any hot water about, and he was afraid of being discovered.

John W. Lincoln. Since De Wolf has been confined, have been to the jail about once a week. I went once with Mr. Louis Dwight, and De Wolf began talking to him, but he said "if you have any confession to make,

you had better make it to the sheriff." He then spoke to me, and I promised to see him in the afternoon. In the afternoon took him into the sitting room with Mr. Matthews, where his conversation was put to writing, and signed by him, and also by Mr. Matthews and myself as witnesses; never gave him any encouragement to hope for escape, or commutation of punishment; told him he had no right to hope for any thing but death,—told him that any confession he could make, would do no good, except by making some atonement to society. He said afterwards, that his statements respecting Mrs. Stiles' innocence, were not true. She had said she wished Stiles was dead, and wished somebody would put him out of the way, but she wanted it delayed till the will was made. At one time she proposed doing it herself, and he procured some arsenic for her, but she had been afraid to use it. After the will was made, she frequently urged him to do it, and it was understood that Stiles should be killed the next time he went out to Cobleigh's. He said he got some arsenic and carried it out with him, but was afraid to use it,—it would be found in his chest, or trunk, at Whipple's stable.

Isaac Davis. Knew Mr. and Mrs. Stiles and De Wolf; first knew Stiles in the fall of '43—was sent to appear for him as counsel, while he was in prison for a small debt; took a deed of trust for Stiles' property. The selectmen of Shrewsbury, where he formerly resided, were desirous of having him put under guardianship, but I took the trust as a compromise. The deed provided that all his property should go, at his death, to his heirs and legal representatives, or to such persons as he should by will or otherwise, lawfully appoint to receive the same. Stiles was about 40 years old,—his wife was married at 16 and is now about 23. The property by appraisal since his death, is about $1000. I did not hear of the will until after Stiles' death. The signature is Stiles'. I notified the selectmen of Shrewsbury of the will and provisions,—they decided to oppose. Mrs. Stiles, and the guardian of Edwin, consented that the will should not be established, and an administrator was appointed.

James Howard. Witnessed Stiles' will, at the request of Mrs. Stiles. I think De Wolf boarded there at the time. I do not know who wrote the will. Mr. Stiles appeared to be of sound mind when the will was made,—his health was not very good.

James Prentiss. Was called upon by De Wolf to witness Mr. Stiles' will, in October last. Mrs. Howard called for me about an hour afterwards. Mr. Howard and De Wolf were present. Stiles was on a bed. Mr. Howard asked if he wished us to witness his will,—he said he did. Mrs. Stiles produced the will, and we signed it; had frequently seen De Wolf at Stiles'.

Luther G. Moore. Saw De Wolf and Stiles at Bartlett's tavern, about 8 o'clock on the night of Stiles' death,—did not notice whether they had any thing to drink.

THE TESTIMONY FOR THE DEFENSE.

Ruth Willard. Was in Stiles' family as nurse, about a fortnight, six years ago last December. While there, Stiles was sent to Worcester one morning on business, and was brought home at night apparently helpless. We got him into the room where his wife was, and at last she got him to bed and said if he went to sleep he would do. All at once he jumped out of bed and went to the secretary and seized some razors. She took them away and got him back to bed. He soon grasped his throat with his hands,—we unclinched them with difficulty and he seemed almost lifeless. There were marks on his throat next morning, as if his fingers had slipped while he was grasping it. He was frequently intoxicated, and when he was, he was very violent, and wished to kill himself; knew Stiles for 15 or 20 years,—he always complained of poor health and shortness of breath.

Gideon Harlow. Was acquainted with Stiles, and used to see him frequently. He used to come home deranged and very noisy. At one time I was called in to assist his mother,—he tried to get hold of his throat and I assisted his mother to prevent him,—he said repeatedly that he wanted to die. I was with him three times in similar turns,—at each time he was very violent; never saw Stiles drink any thing stronger than water, but should judge from appearances that he was intoxicated.

Rudolphus C. Edwards. We told De Wolf that he had better not tell the doctor that he had been on a spree with Stiles, because it wouldn't sound well, but that he found him out doors somewhere, drunk, and took him in to get him sober. Nathaniel Watson and a Boston man were both with us at the time,—Mr. Watson joined in this advice.

Nathaniel Watson. Joined in Edwards' advice—think I did not merely give my assent to it, but repeated it myself.

Thomas B. Eaton. Live in Worcester,—was sexton from 1821 to 1836,—have frequently, almost always, observed dark blood settled on the neck after decease.

Dr. Rufus Woodward. Am a physician. Saw the body of Stiles about twelve days after death, at the tomb, in company with Dr. Benj. Heywood. The coffin was removed to the door, and the door left open; looked at the neck carefully, but saw no red mark. We took out part of the trachea and the larynx,—observed no indentation or wound. There was a redness on the back of the neck extending behind the ear, but I thought it nothing unusual.

Dr. Joseph Sargent. Have been in practice most of the time since the fall of 1837; have been accustomed to make post-mortem examinations. I have never seen a case of strangulation, and can speak of the symptoms only as they are represented in Medical Works. In strangulation the blood is said to be congested on the lungs,—it is my opinion that the amount of congestion depends upon the amount of force applied, and the length of the

agony; cannot conceive of a man strangled by a ligature, without congestion of the lungs. If force enough is applied to prevent respiration, think the effect would be to leave clotted blood in the heart. I should not be able to draw an opinion of the cause of Stiles' death from the medical testimony that has been given,—it does not satisfy me that death resulted from the pressure of a ligature around the neck,—the state of the brain testified, might have resulted from disease.

Dr. William Workman. Have been a practicing physician over 20 years,—have been accustomed to make and see post-mortem examinations. From the testimony presented in this case, I should not be satisfied that Stiles died from strangulation; should not be satisfied to form an opinion relative to strangulation, in this instance, without an examination of all the internal organs.

Dr. Samuel B. Woodward. Reside in Worcester; am superintendent of the Hospital; cannot form a satisfactory opinion as to the cause of Stiles' death, from the medical evidence that has been given—should not think the mark on his neck was so large as in many cases I have known when life has been restored. If a man had a curved back and a short neck, and his head was unsupported, his position would be favorable to congestion of the brain.

IN REBUTTAL.

Dr. B. F. Heywood (recalled). The skin on the front part of Stiles' neck was brought to me from the tomb—the marks are distinctly to be seen. Dr. Green and myself examined it at the time, sufficiently to satisfy ourselves as to its cause.

Dr. F. Heywood. I went to the tomb to remove the heart, lungs and skin of the neck. There has been nothing put upon the skin to color it. It has been preserved by simply drying it on a board.

John D. Goddard. Reside in Shrewsbury—have known Ruth Willard about 30 years. She has lived in Shrewsbury till within four or five years—her general reputation in the neighborhood for truth and veracity, is not very good.

Alonzo Stiles. Am the brother of William Stiles; lived about a mile from William at the time of the birth of his child—he was at my house at the time; never knew of his trying to commit suicide, or being subject to fits.

The defense was opened by *Mr. Bullock* and closed by *Mr. Thomas.*

ARGUMENT OF THE DISTRICT ATTORNEY

Mr. Wilkinson. Gentlemen of the jury: I am aware that this case is an important one to the defendant, but it is

equally so to the community, and no sympathy for the prisoner should be allowed to interfere with the administration of justice. It is important that it should be distinctly understood that the laws are to be executed with strictness, for if the notion goes abroad that the murderer may escape by a want of firmness on the part of jurors, the assassin who was halting in his purpose, is encouraged, and the jury that hesitated to return a verdict against the criminal, becomes responsible for two deaths instead of one. It is the duty of the jury to judge merely of the fact, without regard to consequences, and in forming their judgment they must act faithfully and truly according to the light they possess—they must form their opinion from such evidence as the criminal leaves them which in most cases is wholly circumstantial. The fact that the innocent have been sometimes condemned on circumstantial evidence, should have no weight on their minds for the same objection might be urged against all testimony. A man may swear falsely, as well as a train of circumstances deceive and in some cases, indirect evidence may be even more satisfactory than the assertions of an eye-witness. Collusion of witnesses upon a story that will completely convince the minds of the jury is easy, but when different individuals testify to a variety of incidents without being aware of their mutual connection, if these incidents all tend to a single point, the weight of evidence may be overwhelming.

The prisoner's counsel have insisted that De Wolf had no time to kill Stiles—if the evidence proves this, does it not also prove that there was no time in which Stiles could have died? The witnesses testify about how long they were in the stable, and their testimony is not sufficiently exact to warrant the conclusion drawn in his defense. The death of Stiles is admitted, and even if death were caused by suicide, De Wolf was present, and must have known the fact. What other than a sinister motive, could De Wolf have had, in carrying Stiles to the stable against his expressed desire, instead of taking him home?

The debt to Stiles, for which De Wolf had been once im-

prisoned—the insinuations he repeatedly made, that he should soon come into possession of Stiles' property—the falsehoods by which he deceived the Doctor and coroner, for which the advice of others does not excuse him—the results of the post-mortem examination—every fact and circumstance in the evidence, is consistent with the hypothesis of strangulation by the hands of De Wolf. Much stress has been laid on the imperfect character of the post-mortem examination. Was it really imperfect, and even had there been no such examination, the evidence would still be conclusive. It is not necessary that the body should be examined in every case of supposed violence. This is one of the modes of proof, but not the only one. But was not the examination sufficiently thorough? The brain was carefully observed, and it was found that death evidently resulted from apoplexy; a cause for the apoplexy was then sought, and discovered in the mark on the neck. Everything was noticed that was necessary to satisfy the physicians who were present, and the medical witnesses for the defense themselves admit, that it is not necessary for physicians to enter so fully into details, to judge from their own observation, as in forming an opinion from the reports of others.

When the mark on the neck was discovered, the prisoner began to talk of taking a handkerchief from Stiles' neck, but Stiles' handkerchief was still about his neck. He remarked to Gates, "you won't catch me taking up another man in this way,"—he was closeted with Mrs. Stiles on the morning after the murder—he wrote while in prison to apprise her of her danger—he states in his confession, precisely how the murder was committed, and his statement corresponds exactly with the mode indicated by the physicians—how can we explain all these circumstances, unless there was guilt on his part?

THE CHARGE TO THE JURY.

SHAW, C. J. Gentlemen of the jury: We are now approaching the close of this most important and deeply interesting cause—a cause whose momentous and solemn issues

impose a high degree of responsibility both upon the Court and upon the jury. Nothing might reconcile us to such a responsibility, but the stern necessity of maintaining the supremacy and integrity of the laws. Unless we do that, we prove recreant to the solemn trust which society has reposed in us, and which the public good requires us faithfully to fulfill. The laws must be strictly carried into effect, while the rights of the accused are entitled to all the consideration which is guaranteed to them. You are selected therefore, for a duty which imposes upon you a high responsibility. . . . Now, gentlemen, being thus constituted, and being constituted to act in accordance with truth and justice, there remains nothing more to be done but to obtain all the light that can be found, and render that judgment which the principles of law and equity require. If that is done, we have performed all our duty. If an error should happen to be made after carefully considering the question, and after carefully weighing the evidence and deriving conclusions by the aid of those means which are specified as the best, it would be an excusable error. "To err is human," yet this should not deter us from acting under the weight of high responsibilities. . . . With these remarks, gentlemen, I propose now to proceed on the part of the Court to the exercise of that duty which devolves upon us. It belongs to the legislator to prescribe the punishment, and if the offender is entitled to mercy, it must proceed from the peculiar prerogative of the executive power. In all free governments, laws are not instituted that have not some avenues of mercy. Every government which is not so constituted is an imperfect government. Mercy arises after conviction has taken place, and a jury would depart as far from the exercise of their functions in refusing to convict upon the evidence of guilt, in consequence of an improper assumption of clemency, as they would in refusing to acquit upon just grounds of innocence. . . .

The defendant, gentlemen, stands charged with the crime of wilful murder—the highest crime known to the law. The question is, whether he is guilty of the offense. It turns out

to be merely a question of fact. It is the duty of the Court to instruct the jury in all points relating to the law and evidence, and to determine what evidence is admissible; while it becomes the duty of the jury to make application of that evidence in accordance with the principles of truth and justice. The question is, therefore, one of complicated law and fact.

The prisoner at the bar, gentlemen, is charged with the wilful murder of Wm. Stiles. In order that you may understand the nature of the offense, it is necessary that you should understand that this crime is the highest known in this commonwealth. While there exist various species of homicide, you will perceive we are not called here to discuss at large the principles of homicide. Sometimes the fact of a homicide is beyond all reasonable doubt, but at others, difficult questions may arise, whether the act was justifiable or otherwise. In this case, however, the question is whether the defendant took the life of the victim or not. If so, it must have been a malicious homicide; therefore, if the charge is sustained at all, if the death of Stiles was occasioned by strangulation more or less violent, it must have been from a wilful and malicious design. Whatever else may have been the motive, there is no part of the defense which shows any justification. If this fact is proved, its character is beyond all doubt. It bears all the characteristics of malicious homicide. Whether the motive may have been the possession of the wife, or the property of the deceased, or whatever else, the law regards it as an unjustifiable homicide. Wherever there is premeditation, a preconceived design, a previous threat, or an expression of malice, the only presumption can be that the homicide is malicious. If this act, then, was committed as charged in the indictment, it was an act of homicide unjustifiable and malicious, and falls under the denomination of murder.

Gentlemen, has a homicide been committed? If the life of the deceased was taken or destroyed by the hand of another,

was it done by the hand of the prisoner? These two questions will therefore, occupy your attention.

If the destruction of human life is attained by human means, no matter how near his end, no matter what his circumstances may be, the victim is entitled to the hope of recovery, and his life is under the protection of the law, and to take such a life is an act of homicide. Now, was the life of Wm. Stiles destroyed under these circumstances? One fact is beyond all doubt. On the 14th of January last, he was living, and on the evening of the same day, he was dead. The question is then, how did he come to that end? Examination after death is one of the means by which the cause of that death may be ascertained. If, after death, the indications were such that the strong probability is that he died from some pressure or violence about the head, it becomes a matter of importance to determine whether it was occasioned by the deceased himself. There may be a condition of things on a post mortem examination to show that death could not have been occasioned by strangulation, and then the inference would be that it was affected by disease, and so vice versa. But if the circumstances are such as to apply in both cases, nothing more is established than that death was occasioned either by one or the other. You go then to the other circumstances to ascertain what was the fact. The question then is, whether the cause of death was apoplexy by disease or apoplexy by strangulation.

(JUDGE SHAW here introduced illustrations, and quoted some parts of the testimony in the case, which showed conclusively that the death of Stiles could not have been caused by apoplexy from disease, but that it must have been by accidental or intentional strangulation.)

If the circumstances and the appearance indicate that there was an accidental, or an intentional homicide, then, gentlemen, it is for you to determine which. But before proceeding to this part of the case, I will submit two or three remarks with regard to the evidence which has been adduced before you. The English law provides that, where a death

has occurred from violence, a suitable and competent officer shall proceed to the spot for the purpose of investigating the cause and instituting such inquiries as may be proper, in order that the facts may be properly stated, so that the public may be satisfied there was no crime or carelessness in the case, or if otherwise, that the crime may be charged upon its author. Such was the course pursued, and such was the mode of examination adopted in the present case. Now what is the value of the evidence on such an examination, and the facts which it brings here, but to derive testimony from which to form opinions. Opinions are no more evidence on medical subjects than on any other. But in matters of unknown risk, men are called to examine and give opinions because those who are not learned or skilled are incapable of forming correct conclusions. But when they have given their opinion and come here to dictate it before you, both parties have a right to question and examine them. Opinions, therefore, in such investigations are deserving of great weight and consideration, and greater liberty is allowed because they are opinions which unskilled persons cannot give.

Those who were called on this occasion were Drs. Heywood and son, and Dr. Green. Whether others should have been called was a matter for the Coroner to determine. It does not appear whether others were called, nor whether any objections were offered against it. Be that as it may, gentlemen, you have now one question to decide. It is whether this death was occasioned by strangulation or something applied to the neck. A very small amount of force would be sufficient to destroy the life of a person prostrated by disease, debility or intoxication. But was there any force applied to produce death in this case? It is proper you should bear in mind that the more feeble the person the slighter would be the physical force necessary to destroy life, and this circumstance of itself would leave less evidence of the crime. Then what are the facts in this case.

Stiles was a resident of this village. He was a diseased, deformed, and feeble man, possessing a small property, and

given to habits of intemperance, sometimes excessive. He had expended a part of his property under circumstances which induced the officers of the town to make application for a guardianship over him. Instead of a guardianship, however, trustees were appointed to take charge of his remaining property. He could not therefore spend his property during his life time. Thus he was situated in the summer and fall of 1844, and during the winter until his death, doing but little work and living generally in idleness and indulging in intemperate habits. It appears that on the night in question, De Wolf took him in a sleigh (whether at his own request or not does not appear), about four miles from home. They left the stable where De Wolf was employed about 7 o'clock in the evening and were absent about three hours. On his return, De Wolf left Stiles in the sleigh, at the stable, and went to the room of Samuel Stone who was employed in the adjoining hotel, and with whom he had left his key with a request that he (Stone) should attend to the stable while he was gone. Having aroused Stone who was in bed, De Wolf asked for the key and lanthorn, at the same time desiring Stone to go down to the stable with him, as he had got a man there drunk and wanted some help to get him in. Stone could not go on the instant. De Wolf then went down and called on Baldwin, another inmate of the house, for assistance. Baldwin aided in getting Stiles out of the sleigh, and De Wolf carried him up stairs into the harness room and laid him on the bunk, covering him with a buffalo skin and folding another under his head. In the course of an hour of two, it is quite manifest that he died either from disease or strangulation. It is for you, gentlemen, to say which.

Now, if the question depended solely on the anatomical examination, and that examination leads you to doubt to which cause this death is to be attributed, but that it was attributable to one or the other, then you are carefully to inquire which. If you are satisfied that it could not be a suicide, then you are to inquire whether it could have been from external violence, and whether such violence was used by this defend-

ant. In determining this point, you are to look at the motives, the time, and the circumstances.

It is proper, therefore, to look at circumstantial evidence. It is contrary to positive evidence. When it is introduced, it does not profess to be positive proof. It is therefore to connect one fact with another, and the inference which is drawn must be one which may be proved to be fact from the connection of all the circumstances. It has been said that a case of circumstantial evidence may be more plain than one asserted by positive evidence.

One witness may testify to one circumstance, another to another circumstance but both tending to establish the same fact.

A case may consist partly of both positive and circumstantial evidence, and this may be of that class. All the circumstances go to show that the prisoner had the motive to commit the crime charged in the indictment, and when you find the act done, you must investigate carefully all the circumstances connected with its commission. The confession of the defendant, is partly positive, and partly circumstantial. It is positive so far as it corroborates the circumstances, proved. It is circumstantial, so far as it reveals a great variety of circumstances connected with the act. But the question is now as to the confession made and the circumstances under which it is made. The party knows whether they are true or not. If then you have evidence that it was honest and sincere, then you may attach greater weight, to those circumstances. If there were facts or circumstances to excite hopes or expectations of escape then you are to look carefully at the confession itself. You are to inquire whether it was honest and sincere or whether any inducements were offered to entrap him into a confession. If it appears that a man has been seduced by his own feelings, or, that there have been other circumstances to draw out a confession under the anticipation of personal benefit or release, then, gentlemen, you must reject it as being untrue. But if he makes it in the absence of motives or inducements of such a nature, it

may be received as very satisfactory. There is one other fact of importance in the case connected with this confession and one which may test its truth. Mr. Mathews testifies that after De Wolf had made this confession to him, he (Mathews) told him he did not believe his story but that he had thought of a way to test the truth of it, if he would consent to it. He (the prisoner) wanted to know what it was. Mathews told him he would have Stone arrested that evening, as accessory to the murder, and put in the cell adjoining, and after all was still in the house he should commence a conversation with Stone which he could overhear. He (the prisoner) said he couldn't do that, because things would come out against him which would make his case a great deal worse than it now was, alleging that a man in his situation would tell most anything to save his own life. Now is this confession competent and credible. It is for the court to ascertain whether the confession was made under proper circumstances to be admitted as evidence. If the person accused is persuaded or induced by fear or any improper motive to make confession, the Court will not permit it to be introduced and it would be rejected. The letters written by the prisoner have an intimate connection with his confession, and are evidence because they were written under circumstances of no fear or persuasion. One speaks of trouble and alarm, etc., but has no important bearing upon the case. The other dated on the 23rd of February, and addressed to the wife of the deceased is more important, but both are competent evidence, and may be received as such, so far as they corroborate the confession. The court were of the opinion that no inducements were offered the prisoner in order to draw from him a confession, and it was therefore admitted as evidence. In order to make it more full and complete, Mr. Lincoln, the sheriff, who was present, told him to say nothing to him in confidence, as it would go before the District Attorney. The prisoner was taken from his cell to the room of the jailer, and each sentence of his confession was read to the prisoner, who solemnly asserted that all was true. It was then signed by him-

self, and by the sheriff and jailer as witnesses, and afterwards laid before the attorney. The defendant was told that his confession could be of no advantage to him as it exhibited no proof against others whom it implicated. The prisoner further stated that that part of his confession relating to Mrs. Stiles, was not true, he admitted the illicit intercourse and said that Stiles was a diseased and intemperate man and that his wife wished him dead; that he had procured poison for her to administer to him, which she was afraid to do; and that afterwards he had agreed at her solicitations to give Stiles the poison himself, that he procured arsenic for that purpose, having been told by Mrs. Stiles to mix it with hot sling before administering it to the deceased. Under all these circumstances therefore the paper containing the confession is competent evidence.

Now, gentlemen, the question for you to determine is how far all the circumstances in this case taken in connection with the confession itself go to establish the proof of a murder committed by the hands of the prisoner, although he states in the confession that the act was not done by himself but by another; yet the jury are to take it as it is, rejecting what seems to be untrue or uncorroborated and receiving as evidence what appears to be substantiated by the testimony which has been introduced.

Now, coming back to the question, whether this crime was caused by external influences, slight or considerable? If you are satisfied that those influences were used by the defendant, then he is guilty of the charge; if not, he is not guilty. If this death was caused by violence on the part of De Wolf, then it is a homicide.

Now, gentlemen of the jury, was there a motive? This depends on evidence, partly coming from his confession, partly from other evidence. Although the confession does not admit that he did it, it does admit that he procured it to be done. The guilt would be the same as if the crime had been committed by his own hand, he being present, aiding and abetting. In making a confession he might have supposed

otherwise, or that he should escape with a lighter punishment. But it must be considered in every part. If the facts stated or any part of them are inconsistent with the other evidence, then these may be excluded. Gentlemen, what are the facts in corroboration? In answering this question you will consider the previous intimacy of the defendant with the wife of the deceased; the testimony showing illicit intercourse between them, the complaints frequently made by Stiles respecting the intimacy and intercourse, and the frequently expressed expectations of De Wolf, to get possession of the property of Stiles. How far, now is the confession corroborated by these circumstances. De Wolf admitted his expectation that the property would be his, alleging that it was $700 or $800, in amount, that he should receive it by the wife of Stiles. He frequently spoke of his expectation of having money by and by, that he should not always drive a truck team; and when asked by one of the witnesses how it was, he said "through Stiles," stating that he would not live a year, and that he had an understanding with his wife. These circumstances are corroborated by Flagg, Webber, Gates and Pierce, and taken in connection with his confession, have a very important bearing upon the case.

Then, gentlemen, you will look at the opportunity which the defendant had to commit the crime. It is not easy to determine how men would act under such circumstances. It is evident that there was a plan between the prisoner and Mrs. Stiles to entice the deceased, to go out to Cobleighs. This circumstance bears strongly upon the question, as it shows a singular relation between these parties. De Wolf went often to the house of Stiles, was an inmate of the family, yet as a reason for taking him (the deceased) to the stable on the night of his death, he said he would rather detain him there than carry him home on account of his wife. If Stiles was not accustomed to come home intoxicated and if his wife was not accustomed to have him at home in that condition, then the motive assigned was a good one.

Now as to the time. It is contended on the part of the de-

fense that there was no time when this offense could have been committed. When witnesses speak of a few minutes their testimony does not admit of a very great accuracy. If the prisoner committed this crime, he would have done it under such circumstances as would be the least likely to subject him to suspicion.

According to his confession he could not have done it at any other place than at the stable. One of the witnesses has stated that a much less degree of force would produce death while in a state of intoxication or debility from any cause. If then the defendant had no good motive to carry Stiles home but to keep him in his power, then it was a stronger circumstance. Another fact which bears strongly, is the contradiction made by the prisoner in the morning. He was advised not to tell where he had been, as it would not look well, but would operate to his prejudice. This may account for the fact that he did make a false representation. If a man gives a false account afterwards it shows that if he told the truth in the first instance his fears have either been excited, or that he has been advised to make a different statement.

A great number of witnesses have been called in this case whose testimony you will have before you. The evidence of one of them has been introduced to show an inclination on the part of the deceased to apply his hands to his neck for the purpose of committing suicide. This evidence, however, is not material. The testimony also of Drs. Woodward and Workman is entitled to great consideration. . . . I am reminded by my associates that there is one part of the evidence which it is more necessary to speak of. It is the second letter written by the prisoner while in confinement, which was carried out concealed in the sleeve of a person about leaving prison. I have remarked that it was not written under the influence of hope or fear. So far then as the contents of that letter are connected with the confession and testimony in this case, they go to show, that the prisoner had a criminal's sense of conscience, and you will bear in mind that he sought

to induce the wife of Stiles to screen herself, or to escape. This, therefore, is a strong point. With these views you will take this important case and after a careful investigation render such a verdict as it requires. It is important that the laws should be administered according to the principles of Justice and Truth, that the guilty may not escape, and the innocent shall not suffer. If the law accomplish that, it is a perfect law. You will therefore, carefully consider the evidence which has been laid before you in this cause, in order that you may do justice to the defendant and to the country.

THE VERDICT AND SENTENCE.

The case was submitted to the jury at 7 o'clock in the evening and at 10 they came into court with a verdict of *Guilty*. The Court then adjourned to Friday morning at 8 o'clock, June 13. The prisoner was placed at the bar. The CHIEF JUSTICE addressed him in a forcible and feeling manner for 20 minutes, and at its close pronounced the solemn sentence of the Court, which was "that you, Orrin De Wolf, be taken to the prison from whence you came, from thence to be removed at such time as the executive may direct, to the place of execution, where you shall be hanged by the neck until you are dead, and may God in his infinite goodness have mercy on your soul."

THE CONFESSION AND COMMUTATION.

I, Orrin De Wolf, now in confinement in the jail in the County of Worcester, on the charge of having committed the murder of William Stiles, would represent that in November last I boarded in said Stiles' family, that on the night of the town meeting in November, Stiles told his wife to get into bed with me. I had already gone to bed, that she at first refused, but afterwards she complied. I told her that I had a bad disease, but we had carnal knowledge of each other after that night. We, all three, slept together frequently. I went to the employ of Whipple on the 12th December, and boarded with him. About a week after, I first had intercourse with Stiles' wife, she communicated to Stiles, that she had caught the disease, he then charged me with having communicated the disease to his wife and said I must get her cured, or he would make a difficulty about it. I went to Dr. Sargent and told

him that Stiles wished him to go and see his wife, and he visited her—after some days, as she did not get better, he said if she did not get well by the first of January he should leave her; or he would kill me if he had to wallow to his knees in blood—I said to him that I told his wife that I was diseased; he said that he did not know any thing about it. Things continued in this manner until Monday night before Stiles' death—I went to Stiles' house, Stiles was absent, his wife told me I must look out for Stiles, that he did not do me some injury; Tuesday night I went to Stiles' house, when I went to supper, Stiles said he wanted to go on a spree; I told him that if he would come down to the stable, I would take a horse and go out with him—he came down in about an hour. I was harnessing a horse. I asked him where he wished to go? He said that he would go to Cobleigh's. He inquired if I thought Cobleigh had any gin? said I had better carry some out. I took a bottle and got a pint at the apothecarys' on the pretense of wanting it for a sick horse. We went to Moor's tavern, stopped there. Stiles went in and drank there twice—went from there to Cobleigh's, on foot. At Cobleigh's I went in first; Stiles came after. I went out and spoke to Cobleigh, told him that I had brought some gin, told him not to let Stiles know that I had brought it, but if he called for any to let him have it. Stiles soon called for some, and we all drank of it. Stiles drank three times, and was much intoxicated. I then went for the horse and sleigh, and Cobleigh assisted in putting him into the sleigh. I then brought him to the stable. I unhitched the horse, drew the sleigh into the barn, and with the assistance of Baldwin carried Stiles upstairs and laid him on to the bed. Baldwin staid a few minutes when ——— came in, they soon both went out. After a short time ——— again came in. ——— inquired if Stiles had any property? I told him that he had, we were talking about it, when Stiles said that he had lost a good deal. I said to him, that he need not whine, that he would lose nothing by me (I then owed Stiles $50), he said, "You lie, God damn you! and that is not all, you have given my wife a disease." He rose up as if he was coming at me. I said ———, "I wish that he had liquor enough down him to kill him." ——— said, "Why don't you kill him." I said that, "I want to kill him." ——— said that "he had as lief kill him as kill a snake." I then told him that I would not grudge giving any one the $50, that would do it. He said that he would do it for half the money. I told him that if he wanted to do it, to do it, and went out, unharnessed the horse, fixed the bedding and took care of him for the night. In about ten minutes —— came down. I asked him if he had done it? He said that he had. He went out of the barn. I went up, took hold of Stiles and spoke to him, supposed him dead. I went then to the house and told them that there was a man at the barn, either very drunk or dead. Nathaniel Watson and Edwards went there, advised me to go to the doctor's, which I did and afterwards went for the coroner and sexton—told Watson and Edwards where I had been. They advised me not to let it be

known, but to say that I found him in the street, which I did to other people. In company with the sexton I carried Stiles home. His wife asked me if I had killed him? I said, no. She said she was glad that I had not killed him, that she had rather that he should be brought home so than brought home drunk.

The next morning ——— came into the barn. I asked him how he killed Stiles? He said that he put his hand into his handkerchief on the back side of his neck and drew it so tight that he could make no noise. He asked me when I was going to pay him? I told him as soon as I could get the money. He said that I must say nothing about his killing Stiles. I told him that there was a mark about his neck (Stiles). ——— proposed our seeing Stiles. We went to Stiles' house, saw the mark. After we came out of the house ——— said that he thought the mark would not be noticed. Mrs. Stiles, when I boarded in her family, said that she had married for her husband's property, and in spite against her family and wished she could get rid of him. I might then have the property, if I would take her with it, and I refused to have anything to do about it. I commenced boarding with Stiles about the middle of April last and within a few weeks I had illicit intercourse with Stiles' wife, and this continued until Stiles' death.

Orrin De Wolf.

Worcester, Feb'y 20, 1845.

Some time after, the jury that convicted him recommended that his sentence should be commuted to life imprisonment on the ground that he was but 18 years of age, weak-minded and ignorant, and easily influenced by others. A number of petitions, signed by prominent citizens of Worcester County, requesting commutation, were filed in the executive department, and the Committee on Pardons, after having granted a hearing and considered all the circumstances in connection with the case, advised and recommended that the Governor should commute the sentence of Orrin De Wolf to imprisonment for life in the State Prison, and a formal commutation of sentence was issued August 29, 1845.

THE TRIAL OF ALEXANDER WHISTELO FOR BASTARDY, NEW YORK CITY, 1808.

THE NARRATIVE.

A dissolute woman in New York City charged a negro coachman with being the father of her child which he denied, and the infant, when produced, proved to be white. The question that the Court had to decide, was, could such things be? Dr. Mitchill, the great expert of the day, thought the thing quite possible, but although he fortified his opinion with much learning and much authority from history, sacred and profane, the Court decided that the woman's claim was not proved.

THE TRIAL.[1]

In the Court of General Sessions, New York City, August, 1808.

HON. DE WITT CLINTON,[2] *Mayor.*
HON. PIERRE C. VAN WYCK,[3] *Recorder.*
MOTT, BINGHAM AND DRAKE, *Aldermen.*

[1] *Bibliography.* *"The Commissioners of the Alms-House vs. Alexander Whistelo, a Black man, being a remarkable case of bastardy, tried and adjudged by the Mayor, Recorder and several aldermen of the City of New York. 'The wisely curious rack their brain, to solve this problem, all in vain.' New York. Published by David Longworth, at the Shakespeare Gallery, 1808."

*Wheeler's Criminal Cases. See 1 Am. St. Tr.

*Commissioners of the Almshouse vs. Alexander Whistelo, A Black Man: Being a Remarkable Case of Bastardy. New York, 1858.

[2] CLINTON, DEWITT. (1769-1828.) Born Little Britain, N. Y.; elected to New York Senate in 1799; in 1802, he fought a duel with Mr. Swartwout, on account of a political controversy over Aaron Burr; United States Senator, 1802; Mayor of New York, 1803-1815; was several times a State Senator and Lieutenant Governor, and in 1812 was the candidate of the Peace Party for the Presidency of the United States; was elected Governor of New York, 1824, and re-elected in 1826; author of several books.

[3] There are two lawyers of the surname Van Wyck in the New

August 19.

A complaint had been made on June 9th to the Commissioners of the Alms House and Overseers of the Poor of New York City, that they were charged with the support of a certain bastard child of one Lucy Williams, and that one Alexander Whistelo, a negro, was the reputed father of the said child. The negro on June 10th appeared before the Magistrates and pleaded not guilty to the charge, and after hearing witnesses the Magistrates disagreed and the case was brought to this Court for decision.

Mr. Vanhook[4] for the prosecution; *William Sampson*,[5] *Jacob Morton*[6] and *Mr. Nitchie* for the prisoner.

Mr. Vanhook said the points upon which it had been drawn into doubt, and which occasioned the reference to the decision of this Court, were two: First, whether the witness was to be believed; Secondly, whether the fact she swore to was possible. He observed that although many witnesses of learning and experience in such subjects had been called to give their opinions for the satisfaction of the Court, yet he conceived it to be a matter on which technical knowledge could not throw much light; and that each of the members who composed the Court were as well able to form a correct opinion as any professional man whatever. The woman had already sworn positively; and evidence of opinion that went

York City directory for 1808: P. C. Van Wyck, counsellor and recorder, 1 Wall Street; and Samuel Van Wyck, attorney and counsellor, 53 Partion Street. The Van Wyck Geneology (1912) has Pierre Van Cortlandt Van Wyck (son of Abraham Van Wyck and Catharine Van Cortlandt), born about 1780, and married Alice Young. He was Recorder and District Attorney of New York. See 1 Am. St. Tr. 675, 685. 2 Id. 787.

[4] See 2 Am. St. Tr. 203. In the New York City Directory for 1808 there are two of this name: "Wm. Vanhook, Attorney," and "Isaac A. Vanhook, Counsellor." The latter was Colonel of the Fifth Regiment, New York City Volunteers.

[5] See 1 Am. St. Tr. 63.

[6] MORTON, JACOB. Born New York City, 1760; member New York Assembly, 1795; Justice of the Peace, 1797; Colonel of the New York State troops and a Brigadier General in the War of 1812; died in New York City.

to contradict a positive oath should be received with many grains of caution—the more so, as those opinions would probably be opposed by others of very great authority. But he thought unless the woman could be otherwise discredited, such opinions, opposed to positive testimony, were of little weight, and ought to fall to the ground.

THE EVIDENCE.

Lucy Williams. Know Alexander Whistelo; two years ago this August I first saw him; he then told me he was a married man, divorced from his wife, and never intended to live with her again; he wished to marry me; I refused; I did not love him; on April 13, 1806, he then carried me to a bad house, and locked the door; I scuffled with him a long time, but at last he worried me out; he went after that to sea, and after he came back I told him I was with child; on January 23, 1807, the child was born; Whistelo first took the child to himself, but afterwards, when they put it into his head that it was not his, he refused to maintain it.

Cross-examined. He did not say it was his child, but he took it at first; Whistelo went to sea 1st of May, 1806; I saw him next the 4th of August following; I first perceived that I was pregnant before his return; knew it by feeling life; near two months before he returned; he went a third time to sea, in October, and he was gone for the fourth time about eight days, when the child was born; did not go to a bad house knowingly with him; I thought he was taking me to his cousin, Mrs. Grough's.

Mr. Morton. Were you always constant to him in his absence; were you never unfaithful to him when he was away; had you not a white man in bed with you?

Lucy Williams. I had a scuffle with one once; I knocked off his hat; such a person had been in bed with me; he had turned the black man out with a pistol, and taken his place; we had a connexion; am sure we had made no young one, for we fit all the while; I did not hallo; I bid him be quiet; my father was white; he was a Scotchman, a servant; and my mother was a dark sambo.

Mr. Morton. How did the scuffling end—you understand me—did you part friends with the white man?

Lucy Williams. He owes me four dollars which he would not pay, for wages.

Dr. Kissam. After examining those parts of the child which particularly indicate the color of the race, I should not suppose, judging from the general rules of experience, that it was the child of that black man, but on the contrary, of one of lighter complexion than the mother; black persons are almost white at their birth, but change soon after; the change is generally complete, and their true color decided in about eight or nine months; within the year it is complete.

Dr. Hosack. From the appearance of the father, the mother, and the child, and the laws of nature which I have uniformly observed in such cases, I certainly would not take it for the child of a black man; would say it was that of a white one, or at most of a very fair mulatto.

Mr. Vanhook. Has it not some of the features of a negro? If its features, in my judgment, were those of a negro, I should not have given the opinion I did. Dr. Hosack, might it not be possible, judging after your reading or experience in such matters, that in the early stage of pregnancy, the agitation of the mother's mind, irritation, terror or surprise, might alter in some degree the nature and appearance of the child? I am not of that opinion.

Mr. Morton. What is the period at which a mother becomes sensible of her pregnancy (as the witness calls it), by feeling life? From three to four months; but four more commonly than three—at three it very rarely happens.

Dr. Post. From the appearance of the child, would suppose it the offspring of a white man and a mulatto woman, or of two light-colored persons; could discern none of the features of a negro in it; there were instances of black men with black women producing children as fair as this; but they were exceptions to the general laws of nature; my opinion is, that this was not the child of Whistelo; what confirms this most of all is the color and straightness of the hair; as to albinos, have never seen any of them, but from what I have learned from books and conversation, am convinced there is no analogy.

Dr. Seaman. Should not believe the negro to be the father of that child.

Dr. Tillary. Am fully of opinion with the other gentlemen; can not conceive this the child of a black man; have no principles of physiology nor philosophical data to lay down touching *ticks* of this sort.

Dr. Moore and *Dr. Anthon* declared themselves of the same opinion.

Dr. Secor saw the child in question at its birth; it was then quite white; from its appearance at that time and now, am of opinion that it is the child of a white man.

Dr. Williamson. Have seen and observed both the man and the woman; if this was the child of that woman by that man, it is a prodigy; do not believe that prodigies happened, though daily experience unfortunately proved that perjuries do.

Dr. Osborne. From a long residence to the southward, have had most ample means of observing all the varieties that these mixtures of race occasion; but have never seen any fact that could warrant me to suppose this the child of a black man; have seen albinos, but this child bore no resemblance to them; they were always distinguishable by the red dotted iris, and the tremulous movements of the eyes; never have seen the produce of African parents with hair such as this; have seen some with fair or yellowish hair, but that was peculiar.

Mr. Furman. Am keeper of the Almshouse; received an order to take the child and place

it on the books; the black man, Whistelo, took the child, but said at the same time that it was not his.

Dr. De Witt. Have no doubt it is the child of a white man.

Adam Ray (a black). Knew of Whistelo having taken the child to board, and of the mother having it carried away; asked her reasons for taking it back; and her answer was, that since he would not own the child at first, he should not have it now, for it was not his.

Nancy Cook. Lived with the witness six weeks; can not say as to her character, but saw a very *light* man in bed with her; there were two beds in the room; Lucy Williams had one, and I the other; I fell asleep; a man lay with Lucy all night.

August 20.

Dr. Mitchill (sworn.)[1]

Mr. Vanhook. From your observations upon those persons, Dr. Mitchill, and from what you know of this case, be so good to state your belief, whether that child is or is not the child of that black man? It is then expected that I should give an opinion touching the parentage of the child? Yes, sir; whether from all the circumstances, you believe that black man to be its father? It may be expected, perhaps, that I should give my reasons for my opinion, that it may be judged upon its own merits? If you please, doctor; the more so, as the counsel on the other side will probably inquire into them.

Dr. Mitchill.[1] There are three general rules, as far as I understand, touching the propagation of men between the white and black race. First, when the connection has been between white and black, the offspring is a mulatto; second, when the child is produced from an intercourse between a white man and a mulatto, it is then called a quadroon; thirdly, when it is between a black and a mulatto, it is called a sambo. In the French and Spanish islands there are more minute distinctions; but for more certain information, I refer the court to Bryan Edwards' History of the British Colonies in the West Indies, by which any errors of my memory may be corrected. The principle, however, is, that the shade is between the two in equal degree; and it is told in a way that meets my assent, that when a rapid succession of intercourse has taken place between a woman and two men of different colors, twins have been produced of the opposite colors.

Mr. Morton. What are we to understand, doctor, by rapid succession? When a white man succeeds to a black, or a black to a white almost instantaneously. Do not accidental causes sometimes operate a change on the foetus at or after the time of conception? Yes, sir. Will you be good enough to describe them? The changes which take place in the human form during the time of conception are reducible to three heads, according to the observations of D'Azara in his history of the quadrupedes of Paragua. First, when there is an alteration of complexion so as to render the

[1] See 3 Am. St. Tr. 613, and see preface to same volume, page 14.

skin of a black, white, or other variety of color. Second, when the cause or agency manifests its power by frizzling or curling the hair or feathers, this is termed crispation. Third, when the same constitutional change shows itself by a loss of hair or plumage so as to leave a naked skin, it is called peeling. Of these three effects, the last occurs but seldom; the second pretty often; and the first is very frequent indeed, showing that it is a much more difficult process for nature to eradicate hair or feathers than to curl them, and more difficult to twist than to change their color. If it be of any importance to investigate minutely these points, they will be found at length in the work I have mentioned. These accidents, says that author, may befall every man, every quadruped and every bird, to a greater degree in some than in others, and become permanent in the race by propagation from one generation to another without end.

With this view, it would appear, that with respect to the rule we first laid down touching the color of men, there are a vast number of exceptions; which exceptions I shall class under the three last mentioned heads. It is only by comparing those facts with the case before the court, and applying the observations which they furnish, that we can pronounce an opinion; for as to reasoning *a priori* upon such a subject, neither the court nor I, nor any other witness that can be brought, can know any thing of the matter. The most that I can do is to state facts that I know, and from them give my opinion upon the probabilities of the case. The woman here swears the black man to be the father of the child—

Mr. Morton. Doctor I am sorry to interrupt you; but it is necessary I should remind you that the witnesses are only called to give testimony, not to observe upon it—that will be the duty of the counsel in summing up.

Dr. Mitchill. In estimating this case according to the exceptions laid down, and which I have observed are so frequent, and often so widely deviating from the general rule I conceive that it violates no probability to suppose this child the offspring of the connection between the woman and the black man. The mother, who knows most of the matter, has deposed to that fact, and it is not in itself incredible. I have, therefore, no hesitation to say, according to the best of my judgment, as the evidence of the woman is positive, and the fact she swears to violates no probability, I should, were I in the place of the court, confirm the rule.

Mr. Morton. Doctor, you must excuse me—before, you seemed inclined to do the office of counsel, and now that of the judge. This case you say, doctor, violates no probability. Are we to understand from that, that it is a possible case or a probable one? ——or let me ask you, according to your own principles, which is most probable, leaving the woman's evidence out of the question, that this should be the child of a black or white man? *Prima facie* I should say it was a case under the general rule. If I did not adhere to the rule, it would be on account of the circumstances attending the case,

which I take to be an exception; for if I have no knowledge of any matters which go positively to contradict the woman's testimony, I should naturally lean towards it. Do you consider this case as having any affinity with what is called albinage? I have not much experience on the subject of albinos, as my residence has been chiefly in New York, where such accidents rarely occur. But I have known instances of negroes turning white where there was no symptom of disease or sickness.

Mr. Morton. Have the goodness, doctor, to relate them.

(The witness then related the cases of Henry Moss and the negroes Maurice[8] and Pompey.[9])

[8] Some time in the year 1792, Henry Moss, who was born of black parents, and as black himself as negroes generally are, began to grow white. The first whiteness began about the nails of the fingers; but in the course of the change none of them have fallen off, except those of the little toes. There has been no scabbiness, ulceration or falling off of the cuticle—nor could this covering be removed by rubbing, washing or chafing. The whiteness has spread over the whole body, neck, shoulders and arms, and down the thighs and legs. Some brownness remains in his face, hands and feet. He thinks his sense of touch more acute than it used to be; and his feelings so sharpened, that he is more readily affected by the solar warmth than he formerly was, being able, while he was black, to support great degrees of sun-shining heat. A change has taken place in his sight. He has had no sickness before or during this alteration of color to account for it. The skin is of the white carnation hue, and the blue veins plainly visible through it. The *rete mucosum* seems to have undergone the principal change. His woolly hair is falling out, and straight hair coming in its place on his head; and the same thing has already happened on his legs. He observes his flesh is now less disposed to heal from wounds and cuts than it used to be.

A young negro, named Maurice, aged twenty-five years, began about seven years ago to lose his native color. A white spot appeared on the right side of his belly, which is now about as large as the palms of two hands. Another white spot has appeared on his breast, and several more on his arms and other parts; and the sable cloud is plainly disappearing on his shoulder. The skin of these fair spots is not surpassed by the European complexion. His general health is, and has been good; and he has suffered no scalding ulceration, scabbiness or other local disease. The change is not the dead white of the albinos, but is a good wholesome carnation hue. Such an alteration of color as this militates powerfully against the opinion adopted by some modern philosophers, that the negroes are a different species of the human race from the whites, and tends strongly to corroborate the probability of the derivation of all the varieties of mankind from a single pair. Facts of this kind are of great value to the zoologist. How additionally singular

Mr. Sampson. Was there not some other case which you mentioned before the police office? I mentioned somewhat jocularly the loves of Theagines and Chariclea. Chariclea was a beautiful and fair virgin, of Ethiopian parents. Her whiteness was occasioned by her looking on a statue of Venus.

The Mayor. About what time, doctor, might that have happened? The work is written by a christian bishop, Heliodorus, who wrote about the fourth century. It was the first novel I ever read, and made a great impression on me.

Mr. Sampson. As to those cases in which the agency of some external objects upon the mother's imagination produces an entire change in the foetus, have you any facts within your own knowledge? There was a man in the city of New York who kept a cow. Will you tell the court, doctor, the story of that cow? The cow was a favorite with the wife of the man, but he found it more convenient to kill her than to keep her. And how did the death of the cow influence the birth of the child? The cow, affording a larger supply of provisions than was required for family consumption, he sold part and reserved the rest. Among the parts that were reserved, were the feet. The wife saw them hanging up in a mangled state. It was the first news she had of the death of her favorite cow; and she was so vehemently moved and so shocked, as to affect the child of which she was then pregnant. The child was born without any arms, and with distorted feet.

Mr. Sampson. Did you ever converse with the father or mother of the child? I did not. But the child is still alive; and there is no doubt of the fact. Have you examined the child? I saw it once as I passed, playing with a cooper's shaving knife between its toes. I stopped to inquire, and was told the story. Is there no other case, ancient or modern, to support this theory: is there nothing in verse or prose? There is a case, called the Black Case, in Haddington's poems. He was a lord of sessions, or other considerable man in Scotland. The story runs thus:—There was a man who fol-

would it be, if instances of the spontaneous disappearance of this sable mark of distinction between slaves and their masters were to become frequent! They would then be no less important to the moralist and political economist.

[9] Pompey, a very healthy negro, of about twenty-six years of age, about two years since discovered on his right thigh a small white spot, which, from that to the present time, has been constantly increasing to the size of nearly a half-crown piece; while there have appeared, on other parts of his body, other spots, to the number of twelve, of different sizes, but all constantly and gradually enlarging. In several of the spots, the margin is perfectly defined, from a distinct line between the clear white and the natural color. In others there are circumscribed rings of a dun appearance, the external margin of which is very regular. I have the fullest belief that a vey few years will complete the total change.

lowed the profession of an attorney, or a scrivener, who had a very amorous wife. But he had not leisure to attend to all her gayeties. Once, that he was unable otherwise to free himself from her importunities, in toying with her he upset his ink bottle in her shoes. She brought him a black child in consequence. He reproached her, but she reminded him of the ink bottle, and of his awkwardness. There is also the story told by Malebranche, of the woman who saw a man broken on the wheel, and bore a mangled and disjointed child. If such changes as the last are true (and there is strong authority for it), then the mere change of color or complexion is not difficult to believe.

[The cross-examination of Dr. Mitchill was continued by Mr. Sampson; and extending to a variety of topics, produced much anecdote and repartee. The subject of the albinos was fully discussed. Their feeble structure—weak eyes—leprous appearance—their being found chiefly in low latitudes; and the Chacrelas of Java, the Bedas of Ceylon, and the white indians of Darien were instanced; who are all within the eighteenth degrees of north or south latitude. Mr. Buffon's opinion was cited, that they were not a distinct race, but individuals degenerating from black to an adulterated white: supposing the blacks to have degenerated originally from the white to black. But as it was admitted, that the whiteness of this child bears no resemblance to that of the albinos, and cannot be explained on the same principles, it is unnecessary to pursue all the details of the examination on that point.

The proximate cause of the fairness of the albinos was stated to be the absence of the *rete mucosum*, which gives color to the black men: and the dots and redness of the eyes in albinos was supposed owing to organic delbility which admits of extravasation of the blood, and of its lodging in the globules in the iris. The want of the *rete mucosum*, which fortifies the eye of the negro against the sun's glare, is the reason at once why the eyes of an albino are unable to bear the sun, and more fitted to see by night.

Mr. Sampson mentioned the two childen of Chamouni, or albinos of the Alps, with whom he had frequently conversed. He compared their eyes to those of owls and other animals, fitted for night or long twilight, which called forth an anecdote from the witness, of a numerous flight of white arctic owls, which had some years ago visited this city, remained some time, and then disappeared, having never been heard of before or since. *Dr. Mitchill* also mentioned the white sparrows of Sweden, the hares of Albany, and a white bird with which he had been regaled in Canada, whose flesh was very delicate. But to a question put by the counsel, he answered that he had never seen a race of white deaf dogs.

Mr. Sampson. Doctor, since your opinions were likely to be unfavorable to the side I am to advocate, I must avail myself of the privilege of cross-examination. It would be necessary with so learned a witness to say, that the adverb cross was not to be taken in the vulgar acceptation. Cross was in contra-distinction to direct;

and cross-examination meant only an indirect examination. The ignorant, who take things in the wrong sense, often show ill-humor, and put themselves in an attitude to be cross, because they are to be cross-examined. With the candid and enlightened, it proves often an agreeable mode of discussion, and is particularly so to our profession, when it gives us occasion to extract from those of superior learning, knowledge, which we might not otherwise have the means of acquiring.]

Mr. Sampson. What do you think, doctor, of the opinions of Plato, touching the principles of generation? Do you mean also to ask me Pythagoras' opinion on wild fowl? Far be it from me, sir; that question might serve to puzzle a man who was in the dark—mine are meant to elicit light from a source where it abounds. I do not know, sir, to what particular opinions you allude. To his triangle of generation, as well as to the harmonies and mysteries of the Number Three. I have never devoted any attention to such mysteries. A triangle has three sides and three angles, if you can find out the mystery of that. Has not a prism three sides and three angles? It has. Could Plato have meant that any thing resembling a prism could have an influence in generation? You seem, sir, to have thought enough upon the subject to judge. Sometimes the more we look the less we see. Can you, upon any principles of plain or spheric trigonometry, produce a triangle which shall be flat on one side and round on the other? That, perhaps, is an Irish triangle; if so, you can produce it yourself. Will you permit me now, sir, to examine you a little? Oh, doctor, you cannot be serious—not surely in the face of the court?

The Mayor. I think, Mr. Sampson, after the manner in which you have examined the witness, he is entitled to what he desires.

Mr. Sampson. Alas, sir, I am but a poor tradesman, laboring at my vocation; if I let him wind that long chain of causes and effects round me, I shall be so entangled I shall never be myself again. It is play to him but death to me. I pray the court to let the shoemaker stick to his last. —Doctor, are you familiar with the opinions of Aristotle upon matter and motion? Your question, sir, is very general. I shall be more particular. Do you believe that matter is the capacity of receiving form? I believe there is a first cause which is the law to which all matter is subject. The first cause is too far off for my span; let us keep to one less remote. Is it not a corrollary from the opinion of Aristotle, that the son should resemble his father? I do not see that it is. I wish, doctor, I could establish some difference between you and those great luminaries of ancient times. The authority of your opinion requires some such powerful counter poise. Well, sir, propose your questions.

Mr. Sampson. Since I cannot press these great men of antiquity into our service, I shall endeavor to find something in doctor Mitchill, to set off against doctor Mitchill. The counsel on

the other side will not fail to avail himself of your opinions to the utmost extent, perhaps beyond your intention. I wish, therefore, by taking your opinion touching the probability of other facts, to find what degree of belief you attach to the present, and by establishing a standard of faith, fix a boundary line between us; and also to discover, if possible, how much light learned opinions may throw upon this cause.

Dr. Mitchill. Some years ago there was a machine invented, called a light guage or photometer, which was to measure the degrees both of light and shade, but part of it always failed or broke; or, for want of encouragement, it never was brought to perfection.

Mr. Sampson. Oh, what a pity! I once projected a machine to measure happiness, wisdom, love, and other moral qualities and affections; but the ladies secretly discouraged it, fearing to have it known how they loved the fellows. Since then that our machines are out of order, doctor, we must proceed by the imperfect modes of our fathers. Are you acquainted with a story related by Mr. Saussure, of a lady of quality of Milan who had seven sons? I have no recollection of such a story.

Mr. Sampson. It was this: the two first of her sons, and also the two last had brown hair and black eyes; the three intervening had blue hair and red eyes. The author accounts for it in this way: that while the mother was pregnant with three red-haired and blue-eyed children, she had also conceived a violent passion for milk, in which she indulged to excess. This might, when related by Mr. Saussure, have passed for a traveller's story; but it is adopted by an eminent physiologist, Mr. Buzzi, surgeon of the hospital of Milan. What would you infer in such a case? I would infer that the milk must have been blue, such as they sometimes sell mixed with water; otherwise I cannot see how it could have made the children's eyes blue. I think not, doctor; they would have been rather of a cream color. It must have been milk and water, or skimmed milk. It is a loss that the case does not mention which. Do you think it credible, sir, that Louis the Second, king of Hungary and Bohemia, was born without his epidermis or scarf-skin? It is not impossible. Yet for a king to come without his skin, that was coming very naked into the world. What do you think of Zoroaster, king of the Bactryans? I have never thought about him.

Mr. Sampson. Pliny says he came laughing into the world—is that probable? It would be an exception to the general rule, for we generally come into the world crying.

Mr. Sampson. And seldom go out of it laughing; so that as the only time we have to laugh is when we are in it, it is wise to profit by it. Do you recollect Pliny's remark upon this king; that he little knew what a world he was coming into, for if he had foreseen his destiny he would not have been so merry? It was a witty remark of Pliny if it was his. May I ask what you think of the opinion of the great Verulam, that when mothers eat quinces and coriander seed, the

children will be witty? Some persons have a great deal of wit, but I don't know how they come by it. Do you think, doctor, as the counsel on the other side does, that a pistol is an instrument of much efficacy in generation? On the contrary, sir, a pistol is generally used to take away life. There is what is called the *cannon de la vie*. Do you mean that? Of what color may that be, doctor? It may be black or white. Which of the two would be most influential on the birth of a white child? Most probably the white. There it is! I will lay my life that is what the man had in his hand when the scuffle began, that so strongly affected the mother. Did you ever hear how the mistress of Pope Nicholas III was brought to bed of a young bear? No, sir; but many women have had bearish children.

Mr. Sampson. After that, I think they may bear anything. Do you find a great affinity in what concerns generation, between man and beast? Undoubtedly. May not the principle of material affection influence in one as in the other? I am of the opinion. So that when the Dutch farmers on Long Island plough a black mare with a bay horse, to have a bay colt, the idea is not unreasonable? There is nothing unreasonable in ploughing a black mare with a bay horse, nor in a black mare having a bay foal, more than a black hen having a white egg. Does not Mr. D'Azara lean to the notion of a primitive color? He gives the philosophers their choice in supposing our first parents to have been either of white or black complexion.

Mr. Sampson. How do you account for the ring-streaking of Laban's lambs? The fact we cannot doubt; we have it on such high authority. Does it appear to you an extraordinary interference of Providence in favor of an individual, or can it be accounted for by the principle of maternal affection, and by the ordinary laws of nature? By the ordinary laws of nature. That being the case, doctor, there remains only to thank you for the information you have given us.

Dr. Pascalis. The child in question appears to be three-fourths white and one-fourth black. But I pronounce with diffidence upon such subjects, as I know how easy it is to err where there is a want of certain *data*. Nature was uniform in her works and faithful to fixed rules; and when facts are in dispute or doubt, there is no way of forming an opinion but by recurring to those rules which experience has established. Have lived long in the West Indies, and have remarked three principal characteristics of the negro race, and all compounded of it. First, the crispations of the hair. Second, the *rete mucosum* which gives the black hue to the skin. Third, the conformation of their legs and feet. These characterizing marks are discernible in all the mixtures between black and white; but according as the mixture participates more of one than of the other, so naturally will the hair, the features, the complexion and the structure of the limbs. Have observed, farther, that in general when there happened in any one or more of these distinguishing indications a deviation from the general

rule; for instance, wherever the complexion partakes more of the white than from the known parentage, it should be expected, then it would be found that in some other of those indications there will be preponderance the other way. One example out of numbers I had noticed, was the French general, Rigand. He was the son of a white man, a relation of mine, by a black woman. He was so dark as to differ little from the true African complexion; but in return for that, he had the features and form of a white man—was very handsome and well made. If this principle of nature is not universal, it is, as repeated observations had proved to me, very general. The last symptom of the negro blood which disappears, is the crispation of the hair and the setting on of the ancle, amounting to this, that the leg was inserted more forward on the foot, and consequently the heel longer. Therefore, when I was told that this child was of a black man, I examined it to discover whether, seeing its complexion was so unusually fair, there were not some strong traces of the black race to counterbalance that deviation; and upon looking at the conformation of its feet and legs, and more particularly at the straightness and light color of its hair, was disappointed not to find my observation verified; am now of opinion that it is not the offspring of a black man. I conceive the woman to be a perfect mulatto. Have known one instance of a woman of mixed blood having a white skin with the features of a negro strongly pronounced.

Mr. Vanhook. Might not some accident, happening at the moment of coition, produce by its effects upon the woman's imagination as great a deviation from the general rule as this? Why make that particular conclusion? It would be much more apt if it produced any thing, to produce deformity or abortion; but it would be too far-fetched to suppose it would cloud or uncloud the skin. Upon the whole, as I am impressed, I must give my opinion that it is not the black man's child.

Alderman Baker. The woman, when examined before me, said she had no intercourse with any white man. Afterwards, she acknowledged she had had a struggle with one.

Mr. O'Blenis. Am clerk of the police; after her examination on oath was closed, she was questioned as to that fact, and answered laughing, that the white man had torn her petticoat.

Sir James Jay, M. D. Have a decided opinion it is not a black man's child. It was not necessary to wait years to see what conformity there might be in the hair with the mother. It was enough if counsel chose to examine the mother at present.

Mr. Sampson. Doctor, we have been deep in the mysteries of Lucina. Very good, sir; I hope you have profited. No Sir James; it is a cross birth—we are not yet delivered of our doubts. We want to know whether the Abbe Spallenzani's method of propagation is a safe and good one—whether there is not such a thing as *Lucina sine concubitu;* for, as it appears, the black man could not have got the child because it is white, nor

the white man because of the fighting, it would be good to see whether the pistol-barrel could have got it? Then, sir, you must inquire elsewhere touching that matter. I have found the old practice good enough for me, and have made no experiments in the way you allude to.

THE SPEECHES TO THE JURY.

Mr. Morton addressed the Court, premising that it was his intention to be very brief, and to confine himself entirely to the positive testimony and the inferences of law which it furnished, and leave to the counsel associated with him the various topics of curiosity which had been introduced.

Although this case was not of so grave an import, nor so serious in its consequences as a trial for a rape, yet still it was one in which the nature of the proof should be equally certain, as it went to inflict what, to a poor man, was a very heavy penalty, and which, if he was innocent of the charge, would be an insupportable oppression. The conviction here, as in a case of rape, would be founded upon the evidence of a woman, who, by the fact itself might become mother to a bastard child, whose character for virtue and good morals makes a principal part of the consideration. Necessity made this woman a witness, for it is her own cause in which she is swearing. But wherever from policy such testimony is admitted against the great ruling principle of law, that "none shall be witness in their own cause, nor to swear to their own criminality," it is always admitted with extreme caution, and qualified with well-placed jealousy. For it is better even that the community should suffer an inconvenience than an example of injustice be set, and a door opened to oppression.

This woman's evidence, without the irresistible proof which the child's appearance furnishes, and which the opinion of so many skillful men of profession confirms, carries with it its own refutation. [*Mr. Morton* here recapitulated the dates and epoch fixed by the woman from the time she first became acquainted with Whistelo in August, 1806—his going to sea on the first of May, and returning on the first of August—that she felt life two months before his return, which was

only one month from the time she swears to his having got her with child.] All the physicians agree that that symptom of pregnancy does not take place in less than three months, and that it is more commonly four. She has also positively contradicted upon one examination upon oath, what she positively swore upon another. At the police office she said she had no connection with the white man—before this Court she has acknowledged that she had.

There is at least as much reason to charge the white man to be the father, with whom she states on her oath that she had a connection within a few days after the first connection with the black. So short an interval must leave it impossible to determine, from the reckoning of time merely, which was the father. If so, and the matter was otherwise in balance, surely the child being white, is a circumstance strong enough to put it past all doubt. Another fact equally conclusive is what the mother told the witness, Ray, when she took back the child, "That the defendant at first would not own it, that it was not his, and that now he should not have it." Now, if this was a serious crime and a criminal prosecution, such evidence would not weigh a feather. I cannot see why there should be any more hesitation in the present case.

Mr. Vanhook said the arguments did not convince him in any degree that the black man was not the father of the child. And if by fair reasoning, the party who sued was entitled to an order, the Court would, in spite of subtle objections and raillery, grant it in furtherance of the statute. The Commissioners of the Almshouse had instituted this suit as their duty obliged them, and the law directed. The woman's testimony in one view was meritorious—it went to discharge the community from the burden of supporting a bastard child, and to oblige the true father to maintain it, and therefore should not be disfavored.

Much stress was laid upon the time of her feeling her pregnancy, but that was not sufficient to destroy the force of her positive testimony on oath; a difference or mistake of a month or two, which may be the fault of her memory, is not

enough to discredit her. What she said at the police is of as little importance, being easily reconcilable with what she has sworn here. She said she had no connection with a white man, meaning no such connection as could produce a child; and she admitted before the same magistrates, on the same occasion, that she had a struggle with one, and that he tore her petticoat. If she did not say the whole of this when upon oath, at the time her depositions were written down, it is not material; she might not have been so particularly questioned till afterwards; but viewed with common candor, there is no contradiction to discredit her. On the one occasion and on the other her evidence was this, that she had a struggle with a white man, but that she prevented him by resistance from accomplishing his purpose, and was sure there could be no child born in consequence of that encounter.

Why did not the gentleman on the other side call this white man? He could have contradicted her if her testimony was false.

With respect to the alarm with the pistol and its possible effect upon the mother's imagination—that changes in the foetus do happen from such accidents, stands upon the highest authority; and has been supported in a way not to be shaken, by Doctor Mitchill, who has related facts proved past contradiction. Doctor Pascalis thinks it far-fetched to suppose it would change the complexion, but seems to admit that it might produce abortion or deformity; yet the change the most easy of operation has been stated to be that in the color of the skin. Doctor Mitchill has stated that reasoning a *priori* upon such subjects is only presumption; but that where facts of a certain nature have arisen, it is possible that similar facts may arise from similar causes, and he has given instances of infinitely greater changes than this by the power of maternal affection. Certainly, to oppose arbitrary reasoning to the authority of facts, is the height of presumption; and no man is better qualified from his extensive reading and continued investigation, to collate a number of facts, and draw certain conclusions from them.

Lastly, the woman's testimony goes to accredit the supposition that the influence of fear or surprise, and the sudden appearance of the white man armed with a pistol—the struggle that ensued—the irritation it produced—all combined to operate such change.

And although she be an unfortunate woman, and mother of an illegitimate child, yet let me repeat it, that her evidence is here meritorious, as it goes to deliver the community from the support of a bastard, and justly to fix the man who begot it with the maintenance of it. And above all, that she is swearing not corruptly for her own interest; but against it, for if money was her object, the white man was her mark.

MR. SAMPSON'S SPEECH.

Mr. Sampson. May it please the Court: If ever the situation of man was full of peril and difficulty, so is mine. My learned colleague has taken to himself all that was *terra firma* in our cause, and when he had brought me to the world's end, plunged me headlong into that ocean of wonders and adventures where I am now adrift. He has, moreover, taken away his notes on which I relied, and left me no other chart than this stenographic scrawl wherein my eyes can discern nothing but objects of evil omen. Arctic owls, misshapen monsters, and prodigious births. Well might I barter one hundred leagues of such sea for half an acre of brown furze. If I escape this time, I will hang up my drooping garments as an offering to Neptune, and never tempt my wayward fortune more. I will now borrow courage from despair, and to the matter.

Soon after the vernal equinox, in the year of the vulgar era one thousand eight hundred and six, an Adam-colored damsel submitted to the lewd embraces of a lascivious Moor, and from that mixture sprang three miracles.

First. In the course of one month's time she quickened and conceived.

Second. She bare a child, not of her primitive and proper

color, nor yet of the African—but strange to tell, of most degenerate white.

Third. And the greatest of these wonders, she remained, as the counsel for the Almshouse charitably testifies, a lady of virtue and unblemished credit!

I had heard of a sect that trusted more to faith than to good works. The counsel it appears is of that sect, when he asks this honorable Court to put its hand and seal to three such miracles. I would rather be called ignorant and simple than too learned and perverse. But since I cannot believe in the metamorphoses of old, nor in the procreations of Jupiter Ammon, I am sour upon the belief of all other such heathenish stories.

Before I lose myself in the labyrinth through which I am to tread, that I may not die in the learned counsel's debt, I shall first answer all his observations. If I should miss my way, and never return to where I set out, my will is that all concerned shall mourn for me—the whites putting on black, and the blacks white, in token of affection. Item: the manuscript I hold in my hand to be deposited in the city library. Item: the fee which I receive in this cause, to enure to the benefit of the Almshouse.

The counsel says that the reasoning of my colleage has not convinced him. If it had, it would have been a fourth miracle; for certainly the counsel's business here was not to be convinced.

He triumphantly asks why we did not call the white man? and I answer, in all simplicity, because we had no need of him: besides, he is our rival, and carries pistols; and we disclaim all prying into what does not concern us, and all indiscreet meddling with family affairs.

All the justice we ask for our poor black swain, is not to pay for a child he never got, nor be made a worker of miracles against his will. The thing of all things of which he thought the least, and of which he is the least ambitious.

Again, the counsel asks what motive could the woman have to charge the child to a black father, when she could have a

white one? We do not know why—some love the darkness rather than the light.

But it is said her evidence was meritorious, and for the good of the community, charitable, and for the good of the Almshouse. I never before heard of such pious and patriotic fornication.

But if she was disposed to perjure herself, would she not have laid the child to the richest father as well as to the fairest?

Perhaps not. Perhaps she wished to establish a partnership according to the custom of merchants, long used and approved within this city, to make one a sleeping partner, to contribute by his friends; the other the active partner, taking the trouble and responsibility, and giving his name to the firm. She has herself averred and proved this partnership, stated the *locus in quo* and laid the *venue* in her bed, and it is too late now for the counsel to say it was a transitory action after issue found.

There is another legal view of this matter. The child may be a negotiable instrument under the statute of Anne, and one party liable as maker, the other as endorser. It is thus that commerce is every day encroaching on the common law. Formerly a bastard was *nullius filius,* and could have no father. Now it seems he may have two, unless the Court will think that it is carrying the commercial principle too far. Then if the Court will allow only one father to one child, it is to be seen whether it will permit another innovation not less violent, viz: that black men shall be the fathers of white children by intendment of law. If a white man can say to a black one, get out of that bed, you black devil, till I do this thing—by division of labor trade will be advanced—you must do your part of the duty and I mine—I will get the child and you shall father it—there will be in this manner employment for us both. Can that, may it please your Honors, be the law?

As to a complaint made by the gentlemen that we insinuated the evidence on his side to be altogether base, if it

be any satisfaction to him we will retract that saying. We will admit that there was first and second fiddle and base accompaniment. But as he is himself the leader of the band, he ought not to complain of the effect.

After breaking a lance upon my colleague in the honor of this daughter of Eve, he attacks the doctors *en masse*. What do they know, he says, more than other men? But that is not all, he goes farther and levels a shaft at your Honors on the bench, and says you have as much experience in such matters as any doctors or any persons whatsoever. Some gentlemen have a happy knack at saying anything. If I had even suspected any of your Honors of any such experience, or at all to have dipped into such matters, even from curiosity, I never should have ventured to hint at it.

After disposing of the faculty in a summary way, and representing all the doctors who don't believe that black men's children may be white, as a set of coasting doctors, who don't go out of sight of land, who run by the line and the dipsey lead, he then introduces a doctor as a god upon the scene. Never was a god introduced more apropos. It was truly *dignus vindice nodus*. It was no longer your men of experience who believe nothing but what they see, and tell nothing but what they know, who never go on voyages of discoveries or explore the unknown regions of hidden wonders. Not so, Doctor Mitchill. At his name all ears stand erect; might and power are his attributes. Be it so. I rejoice in his strength. I glory to magnify him, for if he be that great Ajax elimonius, who then am I, who have scuffled with him for one hour in the heat of a burning day, and come off, if not with victory, with life, which is great honor? And now having returned by the same sally-port through which I ventured out to skirmish with him, once more I plant my standard on the ramparts of the law, and display to the whole camp the trophies I have borne off the field.

It is grievous to see the disposition that pervades mankind to laugh at serious things. But ever, by the side of eminent learning, there is a nitch where malice loves to

sport. It is a quit rent which the learned owe to us small wits; it is an indemnity for the shade they cast upon us, and we seize upon it by the title of amends. I do very much respect the witness and admire his learning and his candor; but when I think of the odd excursion we have made to discover the parentage of this child of nature, I must either laugh or die of it.

If a witness was wanted with a mind well stored with facts, he stands unequalled. His is like the magazine of some great commission merchant, whose high credit and extensive correspondence brings him consignments from the four corners of the earth—with room for all, and no particular reason for rejecting any, whoever would make up an assortment to answer any demand, may call upon him. If the wares be not all his own, he has a factor's lien on them, and a vested interest, and may dispose of them for the benefit of the concerned. If he parts with them without warranty, and there is no scienter, then they are at the risk of the party who receives them, and the maxim is *caveat emptor.*

It was with this view of ascertaining how far these facts were warranted genuine, or in other words, how many ounces of such testimony went to the pound, that I put so many questions to Doctor Mitchill. I wanted to know whether we were to take by the Winchester or the standard bushel—whether our long measure was the ell Flemish or the common yard; and the Court will very clearly comprehend, or else will not comprehend how we came to treat of Plato's triangle, of the virtues of number Three, and of the probability of the opinions of that great philosopher—viz: that when men and women hold this sort of *tete-a-tete,* it is only for the sake of completing a triangle. If I did not pursue that curious subject farther, it was for this reason. From the moment I found out that a triangle had but three sides, I saw that the doctrine would not apply; for make what angle you will of a man and woman, still as each has two sides at the least, a right and a left, the diagram which they describe must have four, not to speak of others that I am ashamed to mention.

We passed on to Aristotle; but with all his form and his substance, his matter and his motion, his cause and his effect, he could not inform us how, without violating probability, the black man could get the white child; and therefore, as we gained no light, we had no need of any photo-meter to measure how much. Fearing to trust myself longer in the dark, I passed on to the next topic, recollecting an old maxim:

Desperes tractata niitescere posse relinquas.

But I had the consolation to think, that for all that had yet passed between them, nobody was a bit the wiser.

The albinos, with their blood-shot eyes and white hair, with the arctic owls, Swedish sparrows, and white birds of Canada, I leave to the curious in wild fowl.

The strength of the adversary's case I take to be this: that at a critical moment, after Mr. Whistleo and Miss Williams had been just long enough in bed together to be drawing towards a perfect understanding of the business which brought them there, the lady saw, or thought she saw, an apparition of a white man making towards her with his cocked pistol in his hand; and the true point now is, whether that apparition did of itself beget the child, or only change it from black to white after it was begotten, by acting upon the nervous system of the mother? The counsel showed a skill more than professional, which convinced me that he had gone deep into this subject, and probed it successfully. He understands the doctrine of animal appetencies, if not of chemical affinities.

It is curious to see how the learned will differ. Professor Roderer denies the effect of maternal imagination in changing the form or color of the foetus; and for so doing he gains the prize medal of the University of Göttingen. Doctor Mitchill maintains the effect of maternal imagination with all his might. And another profound and ingenious philosopher, Dr. Erasmus Darwin, denies this power in the female imagination; but demonstrates its existence in the male, and says

that the Calipoedia,* or art of getting beautiful children, as also of procreating males or females, may be taught by affecting the imagination of the male parent; for he says that the delicate extremities of the seminal glands irritate the organs of sense, either of sight or of touch. He recommends the art very seriously to those who are interested in the procreation of male and female children; and observes that the *phalii* which were hung round the necks of the Roman ladies, or worn in their hair, might have caused the great proportion of male children. He laments, finally, that the manner of accomplishing this cannot be unfolded with sufficient delicacy to meet the public eye. And I fear myself the squeamishness of the age to be such, that if any professor should propose a course of lectures, or any artist advertise to give lessons in this art, he would find very great difficulty and discouragement. A reflection, by-the-by, involving a satire upon mankind, since it is notorious that the most delicate of both sexes practice, with shameless hypocrisy, what is too bad, it would seem, to be spoken of without offending decency. I greatly wish, therefore, that the Abbe Spallenzani had brought his methods into general use, notwithstanding the slighting manner in which Sir James Jay has treated them, because it would be a means of quieting the most scrupulous delicacy, and relieving persons of elevated sentiment from the necessity of coarse familiarities; and be more suitable every way to the delicacy of the age. But as far as concerns the present point, whether Röderer, Mitchill or Darwin prevail, the cause is not a whit advanced; for allowing that this white man operated upon the organs of sight or touch, whether of father or mother, so as to whiten the child, such a position would give birth to two doubts, more perplexing than any yet appearing. First, touching the identity and individuality of the infant, of which individuality color is a part. For if one makes a child black and another makes it white, shall it, while it continues white, be said to be the child of the father

*Doctor Darwin, and other learned zoologists, seem to have mistaken this term. It should be written *Callipaedopaeia*.—The Reporter.

who made it black, and not rather be taken to be his who made it white? Even upon legal principles, such an act of ownership exercised by a man over the child of another, as bleaching him without authority, entitles him, whose child was so bleached against his consent, to abandon altogether to the wrongdoer, and to throw the child upon his hands. Certainly, if such a principle be established, as that white men can father their children upon negro fathers, it will very much advance industry, and encourage many to go abroad for employment who now stay at home.

But to return to maternal affection. A fair lady, to whom his holiness Pope Nicholas the Third, had committed the sacred charge of bearing him nephews and nieces, brought him, to his utter discomfiture one day, a little bear—and why? why, because he was of the Ursini family, and had everywhere throughout his palace carved and painted emblems of the name and honors of his house. Pope Martin the Fourth, who succeeded to the chair, the palace, and the mistress, fearful of like mischief, had them all effaced; and accordingly his nephews and nieces were nice little popines, no more like bears than Miss Williams' child is like a negro.

At Tzertsogonbosh, in Germany, there was a religious procession. Some of the inhabitants personated angels, and some devils. One of the devils, more merry than wise, took it in his head, as soon as the pageant was over, to run home to his wife, and accosted her, if not in these words, in words to this effect: "You dear plague of my life, for all the vexation you have caused me from the beginning of the world till the date of these presents, I am determined forthwith to do in sort that you shall hereafter be the mother of a young devil." She scuffled, he "worried her out, and had a connection with her;" and whether she felt life in one month or four, she finally bore him a young devil. Doctor Mitchill saw nothing improbable in a fellow playing the devil with his wife, or begetting a little devil. He thought it prudent, however, to inform himself whether it was a dancing devil. I am cautious in what I relate; and as I did not know what

dancing master it had, I would not undertake to say: it was, however, a merry-begotten devil, and probably a dancing one; and it is not impossible that it might have been one of those that tempted Saint Anthony, twenty thousand of whom it is said could dance a saraband upon the point of a cambric needle without incommoding each other.

That the learned sometimes account for things quite differently from the rest of mankind, will appear from the sequel of the story of the lady of Milan and her seven sons. There was a tattle when I was at Milan, but as those who believed it had not read Simon Pontius de Coloribus oculorum, it may be entitled to small credit. There was, they said, in those days, a young Scotch laird, blue-eyed, and red-haired, who made the tour of Italy, to see pictures and statues, and kiss the Pope's toe; but that his devotion was principally warmed by the image of this cis-alpine saint; that he came at different times to worship at her shrine, and finally, that it was he who recommended the milk that turned the children's hair red.

So much for maternal affection with human kind. But as there is a comparative anatomy, why not comparative zoology? and, unfortunately for the pride of man, in the act on which our philosophers and doctors have delivered their opinion, the similiarity is entire. Poets have viewed it in the same light; and the prince of poets defines it to be making the beast with two backs. He, too, by the bye, was for the maternal affection, for he makes Iago alarm Brabantio, lest Desdemona should "be got with child of a Barbary horse," and he should have "coursers for cousins and gennets for german." It was conformable to that idea that I asked Dr. Mitchill whether the farmers on Long Island could reasonably expect to have a bay foal when they ploughed the black mare with the bay horse. He saw no more wonder than that a black hen should have a white egg, and then would have been the time, but for the fear of lengthening out the trial too far, to have discussed the great problem of the eternity of the world, which many venerable philosophers,

according to Censorinus, supported by the single argument of an egg.* For they said no egg was produced without a bird, and no bird without an egg; and as it never could be shown which was first formed, it followed that the world had no beginning. We might have shown upon the authority of Aristophanes, how the world was produced by divine love, and divine love from the egg of night, hatched by chaos. If we had been prepared to go into eternity, there would have been a range! There was a subject fit for philosophy—one never to be determined.

Touching the old cow that was killed, I can only say that whatever Doctor Mitchill says he saw, I believe as if I had seen it; I therefore believe he saw a cripple playing with a cooper's knife, and playing with it between his toes. I believe, also, that the neighboring gossips told him the story of the dead cow; but I am not bound to believe all they said. When such facts occur, it is so natural to run the back scent, and if memory does not furnish something, invention will. I once, however, saw a man who was born without arms, but his father had killed no cow.

It is a good rule, that golden rule of King Charles, to believe the half of what we hear. It is a good rule of jurisprudence to reject all hearsay evidence; and it is a good rule to reject a great deal more. A man made a fortune by wagering to the contrary of what everybody said. If his maxim was true in common life, how much more so in philosophy?

The attorney's case in Haddington's poems, with the difference only between black and white, is a case in point. He was an awkward fellow to upset his ink in his wife's lap. It was such an ill-natured return for her caresses, ingratitude or so black a dye, that he deserved his fate.

The world has been in ignorance on another subject which this trial has promulgated. First, all negroes were supposed to be black. In process of time it was discovered that some were white—and now it appears that others are piebald. He

*Negant omnino posse reperiri avesne ante an ova generata sint Cum et ovum sine ave et avis sine ovo gigni non possit.

that Doctor Mitchill saw, in the very act of metamorphose, was a full-grown man, and could not be influenced, one would think, at that time, by any affection of his mamma to change his color. That fact then remains to be accounted for on some newer principle. I once knew a Mr. Percy, a composer in music and singing master. He taught in my family, and he confessed one day in the fullness of his heart, that he had been credulous enough to throw away a guinea a visit for several months, to a quack, calling himself an ancient magnetist, who undertook by gestures and wry faces to take a purple stain from the cheek of a favorite pupil. In the beginning of the course of magnetism, all parents, kindred and neighbors, glorified this quack, for they thought they saw the mark disappearing from the edge of the lower eye-lash. But finally they were convinced that they were imposed upon.

There was a horse shown some time ago in New York as a wonder, and he passed well enough because his tail was shaved and his buttocks painted dapple green. It is the easiest thing in life to work a wonder.

The last question I took the liberty of asking Doctor Mitchill, in order to come to a just estimate of what he conceives the line of probability was, whether the fact which we have on Scripture authority of the changes worked upon Laban's sheep by the contrivance of Jacob, was to be considered as a miracle, or, on the principles of maternal affection, a thing within the ordinary laws of nature? And the learned witness answered, without hesitation, that it was to be accounted for by the ordinary laws of nature. Seeing that this is so, and that in matters of generation the resemblance is so perfect between man and beast, I wonder it has not been long ago turned to the embellishment of the human species. Ladies might then go to the ball, and Indians to the war without paint; and it would be an innocent pleasure to variegate boys and girls, by means of colored sticks, feathers and ribbands; and the Dutchmen might display their taste upon their children as they do now upon their tulips. How pretty and pleasant to see little natural

harlequins playing about! But for the ignorance of our fathers we might have been burnished like game cocks, and had wives like birds of paradise, and daughters like cockatoos. Now and then those that love curiosities might have a little monster, and for those who think two heads better than one, it would be quite easy to frighten the mother out of a child with two heads.

Let not the learned witness complain that we treat his opinions lightly; the greatest philosophers in the universe have been thought, upon some particular subjects, too easy of belief.

Hippocrates relates that his mother used frequently to tell him that for two years before his birth she had no carnal intercourse with his father. But that she had been strangely influenced one evening as she was walking in the garden.

Galen, in his treatise on the measles, says the disease was brought by a woman who had no father.

Doctor Harvey, who discovered the circulation of the blood is said to have believed and written of a race of men with tails.

Diodorus Siculus mentions a sorceress of Egypt who had passed for the celebrated Isis, upon the strength of bearing children without the help of men, but that a priest of Mercury was detected in her bed.

Livy speaks of a woman brought to bed in a desolate island, where she had not seen a human face for nine years. She was brought, he says, to Rome, and examined by the senate. What a pity that we had no report taken in short hand of the arguments of the jurisconsults, and the opinions of the conscript fathers!

Lord Bacon, in treating of the period of gestation of various animals, says gravely, that an ox goes twelve months with young; and Doctor Mitchill, of North America, was so impressed in early life by reading the novel of the Christian bishop Helidorus, entitled the loves of Theagines and Chariclea, that he could not see any improbability in black men getting white children.

A Prussian soldier was detected taking certain jewels and corporal ornaments from the image of the Virgin Mary, and boldly asserted that she gave them to him. The case was novel, and a counsel of prelates and other learned men was convened, who, not averse to miracles, adjudged the thing possible. Frederick the Great, understood the trap, and suffered the soldier to be discharged; but next day it was proclaimed that on pain of death, none should thereafter take advantage of the generosity of the Virgin Mary. Now let it be proclaimed by authority of the mayor and corporation, that no black man shall hereafter presume to get a white child; but let the fellow be, in the meantime, discharged.

And now that we have returned from our voyage round the world, let us look how the thing stands on a nearer view. Ten or twelve of the most experienced physicians declare this thing next to impossible. One gentleman says emphatically, that if it is true, it is a prodigy, and prodigies, he believes, do not happen, though perjuries do. Some of the professional witnesses have resided long in those countries where if such facts were natural they must have fallen within their notice; but they never saw one such as would warrant their belief in this case—others have practised in that particular and useful branch which enables them to judge with certainty in matters of this nature; and envy cannot deny of them that they have brought more into the world than they have sent out of it. The very gentlemen who ushered into life the babe, whose name will be bright in the annals of zoology, physiology, pathology, and all the ologies (Doctor Secor), agrees that it is the child of a white man. Doctor Mitchill denies it, partly on the authority of the quadrupeds of Paraguay, and partly because Miss Williams has deposed otherwise. Allowing the analogy in such transactions between men and four-footed animals, yet I am not so easy in allowing weight to the testimony of a woman, who swears to her own shame; and if I did give weight to her testimony, I should not admit any conclusion to be drawn from it in this case; for it is as strong one way as the other. She scuffled

with a black man in a bad house, and he worried her out and had a connection with her. Very good. Shortly afterwards she scuffled, or fit, as she termed it, with a white man, and knocked off his hat, but he afterwards came to bed with his hat, and had a connection with her. Did you cry out? No, sir. What then did you do? I bade him be quiet! Well! where is the difference, except in this, that the white man had no hat upon his head? Will it be contended, now, on the authority of any treatise upon generation, that a man cannot get a child without a hat upon his head? Here I might say, without indiscretion, your Honors have experience to the contrary. No well bred man would think of going to bed to a lady with a hat on; if he did, she would do well to knock it off. If he was so much afraid of catching cold, he might have put on his night cap. To be sure, if he be of the society of friends, it alters the case, because then it might be an inconvenience; but could not be considered an incivility—but there is no evidence of that.

Besides this, the evidence of Alderman Barker and Mr. O'Blenis, shows that she has contradicted herself upon oath, for, before them she swore she had no connection with a white man. Here before this Court she admits, when upon oath, that she had. She admitted, it is true, before those magistrates, after her depositions were given in, that she had a scuffle with the white man, and that he tore her petticoat; but that does not reconcile the contradiction upon oath. Tearing a petticoat is not having a connection; nor is it to be supposed that all the passions with which that white man was influenced, were to be allayed by the small satisfaction of tearing her petticoat. Where there are Helens there will be wars; but the most quarrelsome will not fly to arms for the sake of tearing petticoats. I defy all the annals of pathology to show a case of a man affected with such an antipathy to petticoats. But it may be said one of those scuffles was more platonic than the other. I do not believe that. The one worried, and the other fit. Platonic love does not carry pistols, nor jump into bed with its hat on. Such scuffles may differ

in etiquette—but not in reality. "Montague's men are always thrust from the wall, and their women to the wall." Can we believe that the white watch made the black watch turn out, merely for the sake of a warm hammock? If that be so, I can only say, "delicate pleasures to susceptible minds!"

But that is not the argument. The woman herself says, that there were no young ones that time, because they fit all the time. If they fit what more is wanted? One of the counsel asked whether many races of animals were not propagated in strife, and he instanced cats; but he might have taken a still nobler instance, that of the Sabine women, who scuffled with the Roman men, yet bore them children. All history, sacred and profane, is full of children begotten in violence. There are countries where a scratched nose is a sign of victory rather than defeat; and where a woman who surrenders her favors without resistance, is like a general who surrenders a strong place without a shot. Say then that one scuffled like Boreas, the other like Zephyr—still it comes to the same thing; for Zephyr, mild as he was, got Flora with child, and Boreas with his Orythia could no more, except that he got twins with wings on them. The terms in which Ovid makes Flora give her evidence, are so applicable to the case of our Lucy, when she speaks of her black lover, that I am tempted, as well for that, as to show I have not forgotten my Latin, to repeat them.

Ver erat, Zephyrus me conspexit, abibam
Insequitur, fugio, fortior ille fuit.

What is there then but the love of the marvelous that should induce us to depart from the ordinary laws of nature to come at the conclusion, that this child belongs to a black, rather than to a white man? There was no difference but in the manner; and in such matters every man will have his way,

Dick can neatly dance a jig;
But Tom is best at Borees.

There remains but one topic of the evidence to discuss. Cases have been related and assented to by Doctor Mitchill, that where there has been a rapid succession of intercourse between a white and a black man, twins have been born, each resembling the respective incumbent to whom he owes his origin. Upon this ground we are at length enabled to make a proposition which will meet the justice of the case, and of course the approbation of the Court. It appears here that there has been a rapid succession of intercourse in the very terms of the evidence; but of the twins only one is yet come to light, which is evidently that of the white man. The black man's twin is not yet born; but if the lady be as slow in bringing forth as she was quick in conceiving, it will be time enough two years hence to look for it. Let her satisfy the Court that she has lived chaste since April, 1806, and will continue so to do for two years more, and then if there comes a black child *bona fide* the fruit of our connection, we pledge ourselves to maintain it.

THE DECISION.

THE MAYOR. This is an appeal from the police magistrates. It appears that they were divided in opinion respecting the charging the defendant as the father of an illegitimate child, and that the Commissioners of the Almshouse and Bridewell, acting as overseers of the poor, have applied to the Sessions to review the case.

The defendant is a negro—the mother a mulattress—and the child has the hair and most of the features of a white, the color, indeed, somewhat darker, but lighter than most of the generality of mulattoes.

The oath of the woman is positive as to the father; and it is not pretended by the defendant that he has not been connected with her; but he relies upon the appearance of the child to destroy the evidence of the mother.

This case, involving a most important question in physiology, the most respectable medical gentlemen in the city

have been called in to give their opinions, and they almost unanimously declare that the defendant is not the father of the child, as it would be a deviation from the course of nature. Doctor Pascalis has fortified his opinion by some very able remarks; and Sir James Jay, a physician of great respectability, and of the longest standing in the city, has given a decided opinion to the same effect, and has particularly indicated the want of crisped hair as a conclusive circumstance against the testimony of the woman; and he has been supported in his opinion by the president of the Medical Society, and several professors and other distinguished physicians.

The only opinion which militates against the united voice of the profession is that of Doctor Mitchill, and this is more in appearance than in reality. That learned gentleman has explicitly admitted that the offspring of the mother and the defendant would, according to the ordinary laws of nature, possess a color lighter than that of the father, and darker than that of the mother; and that, on the presumption of their being the parents, the appearance of the present child would be an anomaly in the science of man, and a departure from the usual operations of nature.

If, therefore, nothing farther appeared before the Court, we would not hesitate to decide against the appellants; as we undoubtedly repose less confidence in the oath of the woman, than in the opinions of the medical gentlemen who have appeared here as witnesses, corroborated by every appearance, and by our own observations; and it cannot certainly be expected that we would have recourse to the miraculous to bear out and support the testimony of the mother. The rule in dramatic poetry will apply to cases of this nature—

> Nic Deus intersit nisi dignius vindice nodus,
> Inciderit—

But the mother has reluctantly attested, and explicitly admitted, that she had connection with a white man as well as

with the defendant. We can, therefore, even upon her own testimony, be justified in dismissing the present complaint; and we accordingly order, that the application to charge the defendant as the father of the illegitimate child be overruled, and that he be discharged from his recognizance.

THE TRIAL OF ROBERT McCONAGHY FOR THE MURDER OF ROSANNA BROWN AND HER FIVE CHILDREN: JOHN, ELIZABETH, GEORGE, JACOB AND DAVID. HUNTINGDON, PENNSYLVANIA, 1840.

THE NARRATIVE.

When Farmer John Brown of Cromwell Township, Huntingdon County, Pennsylvania, left home to do a week's plowing some distance away, he said good-bye to his wife Rosanna and his five children, for all the family lived with him except two married daughters, one of whom was the wife of Robert McConaghy. On Saturday afternoon when he got back he was surprised to see the handle of the front door missing, and, looking towards the barn, he saw the flames of two shots, one of which slightly wounded him, and as the man who had fired at him, fled from the barn to the woods he recognized his son-in-law, McConaghy. He found the door-handle in the barn, and gaining entrance to his house, discovered the dead bodies of his wife and his eldest son, and the alarm being given and a search instituted by the neighbors, the corpses of the other four children were found at different places on the farm.

McConaghy was arrested, tried and sentenced to be hanged. The drop fell with him protesting his innocence, but the rope broke and while the executioner was obtaining a new one he made a full confession. He said that he did not like Brown and that he made up his mind to murder the family and obtain the money he knew there was in the home. Going over to Brown's farm that morning he met George (16) first; he struck him with a flail and then choked him; then he took little David (10) into the woods and choked him to death; he went back to the house and told Jacob (14) that

the boys were gunning in the woods and coaxed him to go with him, and as he walked from the house in front of him, he shot him in the back. He returned and told little Elizabeth (17) to come with him and gather some strawberries and when they got down to the field he stunned her with a stone and then strangled her. He went back to the farm and watched for the wife, Rosanna, who was making bread in the kitchen, to come to the door; when she did he fired and wounded her in the arm; he ran into the house after her and asked her who shot her. She said she did not know; so he induced her to lie down on a bed when he stunned her with an axe and then cut her throat. He now searched the house for money, finding only seven or eight dollars. He observed the eldest son, John (21), coming home and shot him as he approached the house, dragging the body inside and hiding it under a bed, after taking all the money on his person—about $10. He now lay in wait for the husband, intending, if he succeeded in killing him, to collect all the bodies in the house and burn them, house and all.

After this extraordinary confession the criminal was again hanged, and this time until he was dead.

THE TRIAL.[1]

In the Court of Oyer and Terminer for Huntingdon County, Huntingdon, Pennsylvania, August, 1840.

HON. THOMAS BURNSIDE,[2]
HON. JOSEPH ADAMS,[3] } *Judges.*

August 12.

The *prisoner* had been previously indicted for the murder in Cromwell Township, Huntingdon County, of Rosanna,

[1] *Bibliography.* *"Trial of Robert McConaghy, together with his confession and execution, who murdered his six relatives, the mother, sister and four brothers of his own wife, on Saturday, May 30, 1840, in Huntingdon County, Pennsylvania; to which is added the judge's charge and sentence, and an address to the reader. Philadelphia. 1840."

[2] BURNSIDE, THOMAS. (1782-1851.) Judge. Born near Newton Stewart, County Tyrone, Ireland; immigrated with his father's

John, Elizabeth, George, Jacob and David Brown, and had pleaded *not guilty.*

Alexander Gwin[4] and *George Taylor*[5] for the Common-

family to America and located in Montgomery County, Pa., in 1793; studied law and began practice in 1804; removed to Bellefonte, Pa., March, 1804; admitted as attorney at Huntingdon, Pa., at April term, 1804; member of State Senate, 1811-1812; elected to 14th Congress; served from March 4, 1815, to April, 1816, when he resigned; elected to State Senate and was its presiding officer in 1823; in 1826, succeeded Judge Huston on the bench of Common Pleas; resigned in 1841 and was appointed by Governor Porter to another judgeship in Montgomery County; on January 2, 1845, appointed Associate Justice of the Supreme Court of Pennsylvania, serving in that capacity until death, at Germantown, Pa. See Africa, J. Simpson. History of Huntingdon and Blair Counties, Pa., 1883; Biographical Congressional Directory (1774-1911), 1913.

[3] ADAMS, JOSEPH. Resident of Frankstown Township, when appointed Associate Judge of Huntingdon County; in 1825, elected to lower branch of State Legislature; in 1841 (Mar. 15), commission as Associate Judge, renewed by Governor Porter; served for five years, or until county was divided, the division leaving him in new County of Blair. See Lytle, Milton Scott, History of Huntingdon County, 1876; Africa, J. Simpson, History of Huntingdon and Blair Counties, Pa., 1883.

[4] GWIN, ALEXANDER. (1807-1848.) Born, Huntingdon, Pa.; graduated with distinction, from Dickinson College, Carlisle (M. A.), 1827; afterwards studied law in office of Robert Allison, at Huntingdon; admitted to Bar at Huntingdon, Nov. 9, 1830; divided time between law and politics, the latter leading him to the purchase, on April 23, 1834, of "The Huntingdon Gazette," which he published until 1838; in 1839, appointed by Governor Porter as Prosecuting Attornney for Huntingdon County, holding office three years; elected in 1845 to State House of Representatives; in 1846, retired from politics. See Africa, J. Simpson, History of Huntingdon and Blair Counties, Pa., 1883; Lytle, Milton Scott, History of Huntingdon County, 1876; Catalogus Collegii Dickinsoniensis, 1857; Souvenir Edition, "Historic Huntingdon," 1909.

[5] TAYLOR, GEORGE. (1812-1871.) Born Oxford, Chester County, Pa.; taught country school in Dublin Township and Through Creek Valley, having left school at the age of thirteen; subsequently entered, as a clerk, the employment of David R. Porter, prothonotary of Huntingdon County (afterwards Governor of Penn.); in 1834 began to read law in office of Andrew P. Wilson, and while a student, edited a Democratic newspaper; admitted to Bar at Huntingdon, April 12, 1836; entered partnership with John G. Miles under firm name, Miles & Taylor; in October, 1843, retired from firm; he was elected Treasurer of the county, serving two years; then prepared for Presbyterian ministry, but abandoned intention and returned to

wealth. *Andrew P. Wilson*,[6] *James M. Bell*[7] and *S. Calvin*,[8] for the Prisoner.

The indictment in the first and second counts charges the prisoner with the murder of Rosanna Brown; in the first count by a mortal wound given with the barrel of a gun over the right eye in the forepart of the head; in the second count by cutting her throat with a knife. The third count charges

law; in 1849, when Legislature created the Twenty-fourth Judicial District, he was named for the President Judgeship of the new district (composed of Huntingdon, Blair and Cambria Counties); in 1851, this office becoming an elective one, he was elected and, on expiration of term, re-elected, holding office twenty-two years; died Huntingdon. See Africa, J. Simpson, History of Huntingdon and Blair Counties, Pa., 1883.; Lytle, Milton Scott, History of Huntingdon County, 1876 (account as given by his friend, Col. William Dorris, of the Huntingdon Bar); Souvenir Edition, "Historic Huntingdon," 1909.

[6] WILSON, ANDREW PORTER. (1806-1871.) Born near Roxbury, Franklin County, Pa.; graduated, Jefferson (now Washington and Jefferson) College, 1823; studied for two years in law office of George B. Porter, of Lancaster; graduated from law school at Litchfield, Conn.; admitted to practice in the Superior Court of the State of Connecticut, April 5, 1826; returned to Lancaster and was admitted there in spring of same year; in 1828, appointed by Attorney General Calvin Blythe as his deputy for Huntingdon County; admitted to Bar in Huntingdon, April 16, 1828; in 1837, was a candidate for Assembly, but was defeated, and again in 1840 and 1846, defeated in run for Congress; continued law practice until 1863, when he retired from active service; died in Huntingdon. See Africa, J. Simpson, History of Huntingdon and Blair Counties, Pa., 1883; Biographical and Historical Catalogue of Washington and Jefferson College (1802-1902), 1902; Souvenir Edition, "Historic Huntingdon," 1909.

[7] BELL, JAMES MARTIN. (1799-1870). Born Bell's Mills, Autis Township, Blair County, Pa.; educated in Huntingdon, Pa.; studied law with Robert Allison; admitted to Bar, Huntingdon, Aug. 10, 1824; removed to Bedford for short time; returned to Huntingdon to continue practice law; appointed Prosecuting Attorney for county (Huntingdon) in 1827; in 1838, nominated to fill unexpired term of David R. Porter, who had been nominated for Governor; in 1845, in anticipation of the erection of Blair County, he removed to Hollidaysburg, and entered banking business; organized state banks in Johnstown and Huntingdon; started banking house of Bell, Garrettson & Co., which finally grew into First National Bank of Hollidaysburg, of which he was president until death, at Hollidaysburg. See Africa, J. Simpson, History of Huntingdon and Blair Counties, Pa., 1883; Lytle, Milton Scott, History of Huntingdon County, 1876;

the prisoner with the murder of John Brown with a rifle; the bullet entering the right side of the breast and penetrating through the breast. The fourth and fifth counts charge the prisoner with the murder of Elizabeth Brown; the fourth count by giving her a mortal wound with a stone as described, on the back part of the head; the fifth by giving her a mortal wound with a stone on the forepart of the head. The sixth count charges the prisoner with the murder of George Brown by a stroke on the back part of his head, fracturing his skull, and by a mortal wound inflicted by a stroke on the left jaw with a rifle gun. The seventh count charges the prisoner with the murder of Jacob Brown by shooting him with a rifle through the head. And the eighth count charges the prisoner with the murder of David Brown by strangling.

THE EVIDENCE FOR THE COMMONWEALTH.

Wm. Brown. I was working at the Furnace (Matilda); started away; looked at the clock, it wanted twenty minutes of one; tied the skillet and sledge to the rope, and started over the river; saw this boy, Fisher; catched up together at Pollock's; went together to this side of H. Ricket's; stopped and took a drink; we sat there some time; one of the name of Boblitz came and went on; we went on to Brewster's; boy he went on to Cisney's; walked on to Eli Taylor's; when I came to Cornelius' there was a small girl at the door; came near to the line of property between me and Wakefield; heard my dog bark and howl I got to my house, and reached for the handle of the door; found the handle was not there; looked towards Robert's house, over the fields; as I straightened myself up facing the barn, the first shot

Biographical Encyclopedia of Penna., 1874; Souvenir Edition, "Historic Huntingdon," 1909.

[8] CALVIN, SAMUEL. (1811-1890.) Born Washingtonville, Pa. Educated in common schools and Milton Academy; Principal of Huntingdon Academy for two years then studied law at Huntingdon under James M. Bell; admitted to Bar, 1836 and began practice at Hollidaysburg; Member of Congress, 1848; declined renomination in 1851 and resumed law practice; raised a volunteer company, 1863; Member Constitutional Convention (Pa.), 1872. Died at Hollidaysburg. See Sell, J. S., "20th Century History of Altoona and Blair County," 1911; Africa, J. S., "History of Huntingdon and Blair Counties, Pennsylvania," 1883; "Historic Huntingdon"; "Biographical Cyclopaedia of Pennsylvania," 1874; "Biographical Congressional Directory" (1774-1911), 1913.

came; saw the blaze come out of the mow of the barn; looked in that place to see; could see nothing; then the other shot came; made a step down, and then saw his face between the logs, and said, "You d—d infernal rascal, what are you doing there?" Saw him from his breast to the top of his head, as I started to run towards the barn; saw him run towards the mow hole; stooped down; that was the last that I saw of him; ran behind the barn; could see nobody; went on to the barn floor; the first thing I saw was the handle of the door lying on the log of the mow hole; found both of my rifles there; ran to the back of the barn, and hallowed twice, "halloo" loud; got no answer; ran on to the house, opened the door; turned around, saw my son laying under the bed; my son John; I hallowed three or four times, got no answer; put my hand to him; he was all stiff; his face black, and water running out of each side of his mouth; his pantaloons down, and the shirt drawn up; then ran to Lewis Carother's; saw his sister-in-law in the orchard; called to her; asked her where Carothers was; she said at Bare's; she said she would go down the road and make alarm, and I should go back; ran up the road; John Rinker's wife was setting before the door; told her I was shot, and that John was killed; she told me to go on and she would come down; Atherton and Taylor were chopping over the orchard; ran across and came near them, and called to them to come down; told Atherton to come down and to tell Taylor to come along, too; sat down till Atherton and Taylor both came down; Atherton said, "My God, what is the matter with you, Brown?" I said I was shot, and that my son John was killed; told them both to come along with me, and they did; when we came to the cross-roads that goes to my house and to Bare's, I told one to go with me and the other to go to Bare's; Taylor went with me, and Atherton went up to Bare's; Taylor and I went up; I opened the door; Taylor said he would like to see John; we went in and saw him; Taylor said, "We will go to the barn and take this gun along;" told him he might as well take a club, for there was no ammunition; he said, "We will take it, any how;" we went out into the barn; saw nothing but a bed where some one had been rolling in; there was straw on the mow; some bundles came down; Taylor said, "Let us go to the old house, maybe there is something there;" McConaghy lived in it; looked in the crack; told Mr. Taylor there was nothing disturbed; went on down to my house again; and waited for the others; we kept about till they came; towards sunset, I went in; popped into my head about my money; opened the chest, and found my money was gone; there was thirty dollars; looked in the drawer; twenty-eight cents that was there was gone; a pound of tobacco that was there was gone, also; John Taylor came in; we went into the room; Taylor said, "I think there is some one laying in bed yet;" stepped to the bed and drew the quilt off, and there lay my old woman; I put my hand on her cheek; I told him her cheek was cold; we walked out; the rest of the men

had come together; saw the man in the mow from his breast to the top of his head; he had darkish clothes on; a clean shirt; a black head; had no hat on; to all appearances it was Robert McConaghy; his face I saw; it was plain to me, and I knew him; do not mind what I told Taylor; he asked me if I saw the man; I said I did; he asked me if I knew him; I told him I did; told him it was Robert McConaghy; on the next Sunday he was at my house; he had a Mexican eleven pence; he asked me if I had ever seen any of this kind of money; told him I did not know, but thought I had a dollar of the same kind in my chest; I took the key down from the top of the clock and took out my purse, and opened the purse; this Mexican dollar, a ninety-five cent piece, and four half dollars fell out; he said it was the same kind of money; the two guns found in the mow were mine; I was not in the habit of lending my guns to any one; have owned it since last June; no person, to my knowledge, ever used this gun except what it was used at the time of the murder; Lewis Carothers and Eli Wakefield I showed how to use that lock, also Robert McConaghy. I could not tell how near the first bullet came to me; it was so near I did not hear it whistle; John was 21 years old the 15th of last February; Elizabeth was 17 in January; George was 16 last of March; Jacob 14 in June; David 10, 15th of last March; one of my daughters is prisoner's wife; I have 120 acres of land in Cromwell Township.

John Taylor. William Atherton and I were working in an old field, about half a mile from Brown's house, on the day of the murder; Brown came about 5 o'clock, said there was a man in his barn that had shot at him twice from between the logs, as he stood on the step of his house door; he said he shot his big gun first, for the ball came whistling by his head; the next took off a piece of his ear; he said his son was murdered, and was laying in the house, and the rest of his family had cleared out; he asked one of us to go up to Bare's, and the other to go with him to his house; William Atherton went to Bare's, and I went to the house; first thing I saw was that the floor had been washed; it was quite wet; there was two loaves of bread in the basket that seemed ready to be put in the oven, and two guns on the chest; Mr. Brown opened the door into the sleeping room, and I saw that that room was wetter than the other; John Brown was dead, lying on his back, with his head toward the foot of the bed; the fall of his pants was unbuttoned, and his shirt out; his left hand pocket was drawn about half out; he had his coat off, and his waistcoat pulled over his head; it appeared as if he had been dragged out of the first room; we went and looked around the barn and McConaghy's house, but saw nothing wrong; we then went into the house again, to look at young John; says I, Brown, do you think there is any body in that bed? he said no, I guess not; I said, Brown, you had better look in that bed; we drawed the clothes down, and there was his old woman's head laying on the pillow; Brown began to cry,

and said he did not know what injury he had done to the folks that they should kill off his family in that way; about ten or fifteen minutes before Brown came to alarm us, heard two shots go off; Brown said the man had a dark waistcoat and shirt sleeves rolled up above the elbows, and black hair.

Cross-examined. Should think it was near 5 o'clock when Brown came to us; he told me he found John under the bed; saw no marks of any thing being dragged on the floor.

Wm. Atherton. Brown several times over, stated that evening that he believed it was Robert McConaghy that shot at him; he said it was Robert McConaghy.

Benjamin Bare. The first account I had of the matter, Atherton asked me to go over to Brown's; said Brown had been to him and said he had been shot, and his son John had been killed in the house. Next day (Sunday) early, went again to Brown's; H. Rickets and I agreed to search for the children; on the hill in the oat field we saw their tracks; accidentally came on the boy, he was partly covered up; and inside the field I saw the girl, she was covered with leaves; her head was mashed, as with a stone, the stone was there and bloody; we went back to the house and told the others what we had found; I saw McConaghy on Sunday, when we came down from the children; he had boots on; these boots would make a similar track; the ones McConaghy had on would have made such a track as those in the field and on the log.

Cross-examined. Brown did say on Sunday it was McConaghy; Brown was first suspected, and was taken on Sunday night by the people; I saw him tied in the house on Sunday; the reason that he was suspected was, that he was rough in his family; when I knew what time Brown came home I was satisfied he did not do it.

R. Fisher. Accompanied Brown from the river to near his house; proves Brown's statement, as to time, and swears that he heard two shots soon after he left Brown.

Samuel Faust. When Brown passed Brewster's it was half past 3 o'clock; I looked at the clock.

Rebecca Cornelius. Live half a mile from Brown's house; saw Brown going home; it was pretty well on to 5 o'clock; I looked at the clock; I heard the shots soon after he passed.

Dr. J. G. Lightner. About 9 o'clock on Sabbath morning went to Brown's; first examined Elizabeth Brown; her head presented a mass of bruises, a large incision through the scalp behind the head, two and a half or three inches long; another one on the forepart of the head, under the hair, about two inches long; one on each side, of smaller size; the skull was not fractured; there were no other marks of violence about her; I concluded she might have been murdered on Saturday, in the fore part of the day; her death was caused by the repetition of blows by a stone, or something on the head; the next examined was Jacob; his skull had the appearance of a ball passing from the back of his head and came out before, pass-

ing close beneath the skull; his wound presented about the same appearance as Elizabeth's, if anything, the worms in her wounds were a little the largest; that might have been caused by her hair creating more heat; the wound was larger in the front part of the head; I could put my two or three fingers in the wound; it would have caused instant death; the next was John; his wound was through the body; I think it entered near the spine and came out in his right breast, passing through the right cape of the lungs; the wound was sufficient to cause instant death; the next was Mrs. Brown; she was on the bed; above the right eye there was a wound, three or four inches in length, running obliquely across the extreme corner of the eye, the depth of it I could not tell; the bone was fractured the whole length, but the skull was not separated in the center; this was sufficient to cause death; found her throat cut; the wound above the eye seemed to have been done by a dull axe, at one blow; the cut on the throat was evidently done with a sharp instrument, it was a clean cut; all the important blood vessels were cut; her throat must have been cut after she received the blow; the next was David; he presented the appearance of a person having been strangled; his face black, his tongue swollen and hanging out; there was a small mark on him, and the appearance of a ball through his pantaloons, between his legs, it just circumcised him, as it were, slightly; the next was George; there was a slight fracture on the back part of his skull; I also found his right arm broken; part of the lower jaw was broken; but cannot say whether it was done by a ball or by some animal that had evidently been feasting upon the body; should think that his throat had been cut; all the flesh about the neck and head was entirely eaten off; the fracture of his skull and jaw would have produced death; I am satisfied that he came to his death by violence committed by some person; from the appearance of the bodies, I think Jacob and Elizabeth were first killed; none of the others showed signs of putrefaction; the general appearance of the others were similar; there could not have been much difference in the time of their death; it would, in warm weather, I think, take two hours after death, before a body would become stiff; saw Robert McConaghy on Sunday, when he was brought forward for examination; his nervous system seemed considerably affected; examined his hands; found something at the corner end of his nails, some dark substance that looked like blood; at the edge of the little finger of the right hand there was blood remaining there distinctly; I said, "Robert, is your finger sore?" he said not; McConaghy said, if it was, he did not know how it came; Monday following, I examined his person; saw nothing like blood then; the blood that was around the little finger was gone; the dark appearance about the other fingers and nails was there; found a dark mark on his left shoulder; I asked him how it came there; he said he did not know; on the first day I examined his hands, they presented the appearance of being some-

thing cleaner than men's hands in his kind of life usually are, as if washed particularly.

George Quary. Got at Brown's on Saturday, between 11 and 12 o'clock; went by R. McConaghy's house; it was shut up; went on, and after I had got about 600 yards, heard the crack of a gun down about Brown's house; I made a kind of stop, and looked, but could see nothing; I thought Brown's sons were out in the field and had their guns with them; saw none of Brown's children when I was there; saw no one but the old woman.

Samuel McKinstry. Sunday morning, after the murder, I was at Brown's, about 8 or 9 o'clock; McConaghy and his brothers came to Brown's; they stopped at the milk-house; it was expected that they would know something of the murder; I asked Robert if he knew anything about this matter; he said he did not; that him and his family had went away on the evening before; that he had been to his brother Mike's to a grubbing; he told me after this, that Brown had two guns, that he had had the small gun some time; that when he was away, he left the gun lying in his house, on the bed; asked him if the gun was loaded; he said it was; he said he was not at the grubbing.

Abraham Carothers. Had John Brown hired at the time he was killed; on Friday, 29th of May, Robert McConaghy came to the cornfield where I was harrowing corn; John was setting up after me; we all set on the fence, I suppose ten minutes; then I started off and left them, and drove to the lower end, about forty rods; about the time I turned, John was just starting down his row, and McConaghy towards town; as I came up and John down the row, John said he was going home to buy the colt; on Saturday I was sick in bed; after the middle of the day John came to the room where I was; I knew what he wanted; I told him to go down stairs and get my purse, and to take $10 out; he went down and got the purse, and came back to the room; I saw him pour the specie out and spread it over the bureau, and commence counting it out; I told him I expected he would come home in a bad humor, without the colt; he walked out after a few minutes; that was the last I saw of him.

Joseph Shannon. Am sheriff; the morning Robert was in prison, he cried bitterly; said that he was innocent, and if I knew his situation I would pity him; the thing that bore most hard on him was that he could not account for how he put in his time on that day; asked him how he had spent that day; he stated that him and his wife and two children started early in the morning to go to his mother's; that he had put on a clean shirt that morning and left his dirty one laying on the bed; that he had Brown's small gun borrowed; and he left that laying on the bed; he went on to his mother's, and got his breakfast some time after he got there; he then started to Hare's Valley to hunt a house to move to; he left his mother's, he said, about 8 or 9 o'clock; he then stated that he did not want a house, but that his wife wanted him to move away, because she was afraid

Brown would kill or shoot him; I then asked him if he and Brown had had any serious quarrel lately; he first said they had, but afterwards he said it was two or three years since they had some pretty bad words; Brown's horses had got into the corn, and he was running after them, and had got very angry, and he came to the house and told Brown that if he had a gun he would shoot the horses; Brown told him that he had better take care; that if he shot the horses he would shoot him; I asked him if he had seen any person at Hare's Valley; he first said no; afterwards said that he had; thought he saw a woman, but did not know as she had seen him, and if she had, he thought she would not know him; their name was Turner; stated that he had not heard of the murder till next morning early; he said that he had poked away his time on the road; said, "Oh, that I had not delayed my time so on the road, but had gone to my brother's husking frolic"; stated that he understood that his dirty shirt was missing; he said he knew where he had left it, but he did not know who had took it away; he then said he didn't know what they might do with it to try to make evidence against him; told him that public opinion was very strong against him; he asked me if I thought he was guilty; I told him that from all that I had heard I could not believe anything else; he wept bitterly then, and said he wished he had never been born; at another time he went on to tell me how he supposed this murder had been committed; he said that there was a couple of strangers came into that neighborhood two weeks before the murder, who said they were lost; they came to Cornelius', the man who lives east of Brown's and stayed all night; he then said they were women, or men dressed in women's clothes; they left there, inquiring the road to Hare's Valley; that they had been at his house and Brown's; they inquired there the way to Hare's Valley, but did not go that way towards Chester Turnear's; he stated that he had not seen them, but that his wife told him that it might be them; they had behaved and acted curious; the next time afterwards, two weeks he went to account for the murder, he then said that he believed that it was George done it, and that in shooting he had missed the old man, who pursued him and killed him, and did not like to tell it; though when he was first put in jail he held out the idea altogether that it was Brown; did not assert positively that it was Brown.

THE WITNESSES FOR THE PRISONER.

William McNite. I went to Brown's Sunday morning, about 7 o'clock, after the murder; saw him lying with his arms and feet tied; I told him it was a very unfortunate circumstance that had happened; there was a little dog beside him; he remarked he would give the world if that little dog could speak five words, that it would acquit him; I said I was sorry to see him in that situation; he said his arms hurt him from the

way he was tied; I slackened the rope a little on his arms; I asked Lightner if he thought that was a bullet mark in Brown's cheek; he said it was; said if he had done it himself, his face would have been powder burnt; I went to the house to Brown, and asked him to let me look at his cheek; then he commenced telling me when he left the furnace; he did not know who it was; it was a smallish man in his shirt sleeves; when he stepped down he called out, "You d—d rascal," etc., and threw down his load, and started to run towards the barn; he said he could see a glimpse of him as he ran across the mow; as he jumped on to the barn floor he just got a glimpse of him; as Brown went along he showed me where he was when he saw the man jump on the floor; they were both running at the same time, as I understood him; he had got to the spring-house when he saw him jump on to the floor; he saw him no more; he said he was so stunned he could not tell who it was, but it was some man about the size of Robert McConaghy; he never told me that it was McConaghy that shot at him; after George was found he told me he blamed Robert for the deed; I heard Robert ask Brown if he blamed him; Brown said he did.

Peter Hare. Came to Brown's about a quarter of an hour after dark on Saturday; asked him if he knew who shot him, and he said not; a little while after, about a quarter of an hour, he saw a man jump down off the mow; he said he supposed it to be McConaghy; he had a blue or black jacket on.

John McConaghy. Robert came down to Brown's with willingness, on Sunday morning, as far as I know.

The *Counsel* for the Prisoner and Commonwealth addressed the jury at length.

THE CHARGE OF THE COURT.

JUDGE BURNSIDE. The prisoner is on his trial for murder, which the law defines to be the killing another with malice aforethought, either expressed or implied. Our law declares that "All murders which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree; and the jury before whom any person indicted for murder shall be tried, shall, if they find such

person guilty thereof, ascertain in their verdict, whether it be murder of the first or second degree."

The indictment, in the first and second counts, charges the prisoner with the murder of Rosanna Brown; in the first count by a mortal wound given with the barrel of a gun, over the right eye, in the forepart of the head; in the second count, by cutting her throat with a knife.

The third count charges the prisoner with the murder of John Brown with a rifle; the bullet entering the right side of the breast, and penetrating through the breast.

The fourth and fifth counts charge the prisoner with the murder of Elizabeth Brown; the fourth count by giving her a mortal wound with a stone, as described, on the back part of the head; the fifth, by giving her a mortal wound with a stone, on the forepart of the head.

The sixth count charges the prisoner with the murder of George Brown, by a stroke on the back part of his head, fracturing his skull, and by a mortal wound inflicted by a stroke on the left jaw, with a rifle gun.

The seventh count charges the prisoner with the murder of Jacob Brown, by shooting him with a rifle through the head.

And the eighth count charges the prisoner with the murder of David Brown by strangling.

You have heard how and when the murdered persons were found. In this stage, I will refer you to the testimony of Dr. James G. Lightner. He swears that about nine o'clock on Sabbath morning (31st May), he examined the bodies. The first was

Elizabeth. Her head presented a mass of bruises; a large incision through the scalp, in the back part of the head, two and a half or three inches long; another on the forepart of the head about two inches long; and one on each side of the head of smaller size.

Jacob was next examined. His skull had the appearance of a ball having passed through the brain—entering the back part of the head, and coming out at the front. He could not

say whether there were two balls in the gun—the hole larger behind than before—but that it was immaterial, as such a wound would produce instant death.

He thinks these two were first killed, as fermentation had commenced in the wounds, and worms formed.

The next was John. He found a wound through the right breast. He first thought the ball entered the breast; but, on further examination, he thinks it entered near the spine, and came out at the breast, passing through the right lobe of the lungs. It was a mortal wound.

Next was the old lady. She was lying on the bed—had a wound above the right eye, between three and four inches in length, obliquely across the corner of the eye. The depth he could not tell. The wound above the eye done with an instrument like a dull axe. Her throat was cut with a dull instrument, and all the important blood vessels separated. He thinks animation was suspended before the throat was cut.

David he found laying on his face. He presented the appearance of having been strangled. His face was black—tongue swollen and hanging out. A ball had passed through his pantaloons; it just touched him slightly.

George had a small triangular fracture on the back part of his skull. The doctor could run his little finger into it. His right arm broken two inches above his wrist. The appearance of a severe contusion on his jaw bone—and, he thinks, his throat cut. He came to his death by violence. An animal had eaten the flesh off his head.

It is a settled law that if the party died by the same kind of death mentioned in the indictment, it is no ways material whether the right instrument be mentioned. If it is laid as done with a sword, and upon evidence it turns out to be a staff, hatchet, or any other weapons, it will support the indictment. The substance is, whether the party gave the wound which caused the death. It is not material as to the description of the weapon. It is better to describe it accurately.

That these several murders were committed by some one,

"wilfully, deliberately and premeditatedly," as laid in the indictment, there seems to be but one opinion. There can be but one. The crime, for wickedness and atrocity, is unexplained in this or any other civilized country.

There is but one inquiry. Does the evidence satisfy you that the prisoner did the acts charged upon him? If that inquiry be answered affirmatively, there can be but one result.

The evidence is presumptive. Direct and positive evidence cannot always be obtained. The law admits circumstantial or probable evidence. Presumptive proof is either violent or probable. A man should not be convicted on probabilities; but violent presumptions may amount to full and satisfactory proof. Violent presumptions are, when circumstances are proved which usually and necessarily attend the fact; and are, therefore, considered to be full proof, till the contrary appears. As if a man be found suddenly dead in a room, and another be found running out in haste with a bloody sword. This is a violent presumption that he is the murderer; for the blood, the weapon, and the hasty flight, are all the usual concomitants of such a horrid deed.

The next proof to the sight of the fact itself, is the proof of those circumstances which do necessarily attend such fact. Every presumption is more or less violent, according to the several circumstances proven; both more or less usually accompany the fact to be proved. It is difficult, nay, almost impossible, to lay down precise rules, which should govern the jury. We instruct you, that each particular case must depend upon its own nature; and circumstances and presumptions will become serious when the appearances are not accounted for by those whose power it is to account for them. So, if different or false accounts be given.

You, gentlemen of the jury, who have diligently attended to the evidence, will consider it carefully, and regard the rules we have stated, and will state to you. You have heard Brown's evidence. We state an outline of it. On the day the murders were committed, he left Matilda Furnace about 1 o'clock, with a griddle and sledge on his back, for his own

dwelling. That he traveled in company with Fisher, and saw and spoke to several persons on the road, and that he reached his own dwelling about 5 o'clock in the evening. So far his testimony is supported, and stands uncontradicted. He swears, "I stepped up and took hold of the handle of the door; found the handle not there; looked towards Robert McConaghy's, and looked round, passed the barn at the rye-fields; straightened myself up; there was a shot; I saw the blaze out of the mow of the barn; I looked to see him; I could see no person; then came another shot. I stooped, and saw him; and, says I, you d——d infernal rascal, what are you doing there? I saw him from his breast to the top of his head; he was looking at me; I ran towards the barn; he ran, stooped in the mow, and jumped down; I found the handle of the door on the log of the mow; found my rifles on the mow." He then detailed how he went into the house, and how he found John. He tells you how he went to make the alarm, etc. He adds: "I saw him from this [breast] to the top of his head; he had darkish clothes on; a clean shirt; black head; had no hat; from all appearances it was Robert McConaghy; his face was plain; I saw it plain; I knowed him at that time." Taylor returned to the house with him, and he swears that he asked Brown if he had any suspicion who shot at him. He said it was Robert McConaghy, and no other man. He saw him as plain as he could see me then. William Atherton swears he told me he was a smallish man; described his clothing; and that he stated several times that it was Robert McConaghy that shot at him. Bare heard the same thing that evening. To Hezekiah Rickets he described McConaghy, too.

Then when Wilson and others were detained to go to old Mrs. McConaghy's, on the mountain, but they were not to communicate to Robert McConaghy that he was suspected.

By 10 o'clock, a great number had gathered. Brown was arrested—tied—insulted—and charged as the murderer; and so continued until the next afternoon. Almost every man was inquiring at him. His face and neck were bloody, and

his wound undressed. Many men were questioning whether he knew who shot at him. To some he answered "no," to others he stated that the prisoner was the man who shot at him, and he knew him. That he did, situated as he was, declare on Sunday, that he did not know who shot at him, and that he so declared, at some other times, seems to be true. We agree this militates against his evidence. Yet we think great allowance may be made by the jury to the situation in which Brown was placed. A person questioning another, does not always understand the answer; nor is the question always correctly understood. Brown never averred that he knew who murdered his wife and children.

Now, as to the prisoner, you have heard the facts and circumstances proved against him. It is proved that he went to his mothers, with his family early on Saturday morning. There is proof that he left his mother's dwelling about 9 or 10 o'clock. It is not alleged that he was seen by any one (except by Brown), until about sun-set, a period of between 9 and 10 hours. You have heard his relation of that period; and if he gave different accounts of where he was during that period, it makes against him. Is it not clear from the testimony of Dr. Lightner, that Elizabeth and Jacob were murdered pretty early in the day? We submit to you whether it was possible for any person to perpetrate the crimes proved, unless he was well acquainted with the children, and had their confidence. Quary swears he was at Brown's between 11 and 12 o'clock. The old lady was then at her dough-trough. None of the children were then about the house. He heard a shot.

When the prisoner came first to Brown's, on Sabbath morning, Mr. McKinstry swears that when first taken into custody, sitting on the fence, he told him, that on Saturday he had been at his brother Mike's grubbing. About the same time Rhodes swears he heard Robert say, he "was clear." "Yes," some one said, "he was at the grubbing yesterday." Robert made no answer. When Mr. McKinstry asked him shortly afterwards if he was at Mike's grubbing, he said he

"was not." After this, he accounts for himself by stating that he was in the woods sitting on a log, on Clear Ridge. When it remains necessary for a man to account for where he was the day before, if he gives different relations of what he was doing, and where he was, it is a circumstance against him. You have heard how he seduced John to return to his father's on Saturday. You have heard the circumstances of the tracks and the boots—the alleged blood on his hands—his knowledge of the guns—of the family—of the whole ground—of the description of his person by Brown, as well as all the other facts proved; and if, on the whole, they satisfy you of his guilt, your duty is obvious. As you cannot hear the evidence out, we will read it to you.

The counsel for the prisoner says that there are but three circumstances upon which any reliance can be placed.

1. The testimony of Brown, alleging that he knew at the time that it was the prisoner that shot at him.

2. The circumstance of McConaghy's account of where he was that day.

3. The fact of his visiting John the day before, and seducing him home on Saturday.

We agree, these are the leading circumstances; but there are many minor ones, which, if they accord, and are consistent with these, will tend to their support and weight. If the jury should find any of the minor circumstances to militate against these, it will tend to weaken them. But do not all the minor facts and circumstances support the leading ones? Do they not all tend to establish the fact that Robert McConaghy committed the crimes charged in the indictment? You are the judges of this. We agree that suspicion is not proof; that a man ought never to be convicted on probabilities; but that the circumstances which should satisfy a jury of guilt, should be fully established; that the facts proven should be consistent with the charge; and, lastly, that the circumstances should be of a conclusive nature and tendency. We agree that the investigation of the circumstances in this case has left every other

human being (of which the court and jury has knowledge) clear even of suspicion. Still it lies on the Commonwealth to satisfy the jury by the evidence that the prisoner is guilty. If that has been done, it is the duty of the jury to pronounce according to the evidence. If, on the whole case, they cannot come to that conclusion, but doubt, rationally doubt—their minds vacillating—it will operate in favor of the prisoner.

THE VERDICT AND SENTENCE.

The *Jury*, after a short delay, returned a verdict of *guilty*.

JUDGE BURNSIDE. Robert McConaghy, you have been tried by a jury of your countrymen for the "wilful, deliberate, and premeditated killing," of Rosanna Brown, John Brown, Elizabeth Brown, George Brown, Jacob Brown, and David Brown.

The jury were of your own choosing. Able counsel were assigned you. Compulsory process, at the expense of the county, for any witness you might name, was awarded by the court. Your case was carefully and patiently heard. Your jury did not hesitate: they pronounced you guilty of the highest crime known to our laws. The finding of the jury fixes your guilt, and establishes the facts put in issue.

Your case is without parallel in criminal jurisprudence. John, your brother-in-law, of twenty-one years,—a young man in the vigor of manhood,—you by falsehood and cunning brought to his father's dwelling, and the moment he reached it, from your covert, you sent a rifle ball through his breast. Elizabeth and Jacob, you early on that fatal day, seduced from their mother's side; through the brains of the latter you sent a rifle ball, and the skull of the former you beat with stones. George and David you entrapped in a different direction: the former, you treacherously disabled by a stroke from your gun, and then you probably shot him and cut his throat! The child David fled: you sent the rifle ball after him, most probably from the gun of George; it missed its deadly aim —but you were not to be disappointed in your work of death!

You followed the child—seized and choked him until life was extinct. You returned to the house. There, your aged mother-in-law was engaged in baking, and you struck her senseless, and then cut her throat. You covered her up in bed. Then with your rifles, you returned to the mow of the barn to await the arrival of John; and, on reaching his father's dwelling, you killed him, as before described. You dragged him under his mother's bed—washed up the floor—then returned to your hiding place in the barn with the two rifles loaded, to await the return of the father of this family, and the father of the wife of your bosom. You took the handle off his door, and when he came to it, he could not find entrance: he turned partly around, looking for his aged wife, and you fired and missed him. You took up your other weapon of death, and fired, and slightly wounded him. His eagle eye saw you; and you fled in his presence from your hiding place. For barbarity, treachery and depravity, your cruelty and wickedness have not been surpassed by the pirates of the West Indies, or the savages of the wilderness!

This brief detail is not wantonly made to distress you. Our object is to draw your attention to your situation; and to impress upon you that it is our solemn opinion that there is no mercy for you on this side of the grave! that your days are few, and your end not distant! We beseech you, seriously and solemnly, to turn to the fountain of mercy—to that Saviour who died upon Calvary for the sins of the world! Attend to the ministers of the Gospel, those messengers of peace, who will visit you, and pray with you, and point out to you the road of repentance. God knoweth our most inmost thoughts. Let your cries be for mercy to the throne of grace! And let your reliance for that mercy be upon the Saviour of the world!

The sentence of the law is, that you, Robert McConaghy, be taken hence to the place from whence you came, within the jail of Huntingdon County, and from thence to the place of execution within the walls or yard of the said jail, and that

you be there on Friday, November 16, 1840, hanged by the neck until you are dead—dead—dead!

And may God have mercy upon your soul!

THE EXECUTION AND CONFESSION.

Though repeatedly urged by the clergymen who attended during the trial, to confess his guilt, he continually refused, entertaining the belief that if he confessed not, he should escape being hung. He persisted in his refusal to the very last. He was brought forth to the place of execution, and although he shuddered at the sight of the scaffold, and death, yet he turned a deaf ear to all entreaty designed to lead him to a confession of his guilt. The drop fell, and it was thought he had gone into the eternal world. But providentially the rope broke; he was yet upon the shores of time. Another rope was brought, and he again was placed upon the scaffold. Being now deprived of all hope of life, he called his father-in-law to him, and having asked and obtained his forgiveness, made the following full confession:

"I am in the 31st year of my age. I had not the advantages of education; I could read a little in print, but not in writing. Oh! had I been better informed, it would have been better with me today. I was not in the habit of going to church—seldom have I been in a church. I had determined to take my woman the Sabbath after I was arrested, and have my children baptized. Oh, had I read this book (the Scripture), I should not have been so wicked. I was also much given to swearing. I was not a drunkard, but did drink sometimes, and was a few times drunken. I was not long in making up my mind to commit this murder; about a week, as near as I can recollect. I killed George first. I beat him with the supple of a flail, and left him wounded. I thought he was dead, but I found he was not. I then choked him to death.

"I then took little Dave out into the woods. I knocked him down with a little stick, and choked him to death. George halloed and screamed a great deal. I then went back to the house and took Jacob, and told him the boys were gunning back there. I then shot him as he was going on before me. I killed him dead. He was shot with only one ball, I think, but I did not load the gun. I say this because it was testified in court that he was killed with two balls. I went back to see if the two boys (George and David) were dead. I found them dead. After I had killed George, I would not have gone any further, if little Dave had not come out to me. (It is understood by this, that David came out to meet him as he was returning from the murder of George.) I then went back to the barn, to see if I could get any chance at them in the house, but could not. I then went to the house, and took Elizabeth, and led her out to gather strawberries; she had a little bucket, and me a pan. I beat her on the head with stones, and then put my foot upon her neck, and choked her to death. I then went back to the barn, and sat there a

spell, waiting for the old woman to come out. She came near the door, and I shot at her and hit her in the arm—and she ran about the house holding her arm. I then ran to the house, and asked her if she knew who done it. She said she did not know. I told her to go into the room, and go to bed. I said this for fear she would faint. I then brought her a drink of water. God bless her! but I have pitied her since! I thought a heap of her. I don't know whether I can be forgiven for being so wicked. (Here his voice faltered, and he was ready to weep.) I then got the axe, and hit her above the right eye with the pole or side of the axe, I am not certain which. She then fell over on the bed on which she was sitting. I then cut her throat with the axe, to put her out of misery. I then threw a quilt over her. She was busy at the chest when I commenced. I do not know whether she was making bread or not, may be she was. (He here asked whether he must tell everything; and being answered, "Yes, everything," he proceeded to say)—I then went to Brown's chest, and took from between seven and eight dollars from it—this was all I could find. I also took some tobacco, a box of percussion caps, and some lead; I then took them to the barn and hid them. I then washed the blood off the axe. I did not scrub the house; the women had done it just before. (This was said in reference to the supposition that he had washed the floor.) I then fastened the windows down, shut the door, and took the handle off, and went to the barn. I then went up to my house, got some water to drink, and also some water and soap to wash my clothes. I then took my shirt, pantaloons and vest off; they were spotted with blood. I washed them and hung them up in the sun to dry. I put on an old shirt and pantaloons, which I brought from my house, while the others were drying. I sat there until John came home. When he came, he got off, and hitched his beast in the lane. He then went to the door, but as I had the handle, he did not get it open. He turned round with his face toward the barn—I shot and hit him in the breast. He started and run, and climbed over the fence and halloed, and made a great noise. He ran up the lane till he came to the bars leading to the barn, about twenty-five or thirty yards, and laid down. I went to him with the gun in my hand, intending to shoot him again, if he was not dead. When about half way, I laid down the gun, thinking he was dead. I found him dead. I took hold of him to drag him to the house; I put my arms around him, under his arms. I laid the fence down as he was very heavy. I had a hard siege in getting him in. I dragged him across the floor into the little back room, and pushed him under the bed. I found eleven dollars on him; some in his pocket loose, and the rest in his pocket book. I then went to the barn, and waited for Brown. The money I got from John, I hid in the barn. After awhile the old man came home; I shot at him and missed him; and then I shot again. He then ran toward me. I then jumped down and ran away. Brown swore in court I had a jacket on at the time; I had no jacket on. I then came back to the barn, and got my clothes, money, powder-horn, or shot-pouch, and the tin, and went over to Hare's Valley. I pulled off my clothes and

changed, and hid them; the money, shot-pouch, and the tin, I hid on the north side of Jack's mountain, half or three-quarters of a mile from the path on the left hand side, about half-way down the mountain. I put the things under an old log, near a deadened piece of woods; the money I put above the log, and covered it with a piece of bark. Going over, I did not take the path, but went through the woods. After I had hid the things and the money, I came out right above John Wall's; then went to Thomas Green's, and from there to Stever's, and then came home to my mother's, and there stayed all night with my woman; and next morning I went down to Brown's. I did not like Brown, and murdered them for their little bit of property; I thought I had as good a right to it as any of them. If I had killed Brown, I intended to put him in the house, and burn them all up. I went to John the day before, and asked him to come home, and he promised he would, if he got done ploughing the corn. I was near making confession three or four times before; but didn't like to do it, because it would be a disgrace to my family."

THE TRIAL OF W. J. COOK FOR BLACKMAIL, ATLANTA, GEORGIA, 1918.

THE NARRATIVE.

Asa G. Candler,[a] Mayor of the City of Atlanta, Georgia, a man of large wealth and a philanthropist of note, was applied to one day in the summer of 1917, by a couple of females for a license to permit the raffling of an automobile for the benefit of the Red Cross. One of them, whom he had known before, introduced the other to him as Mrs. Hirsch. Some time after, at a luncheon given by the Rotary Club, to General Swift and his staff, he met Mrs. Hirsch again, who, with other ladies, was selling tickets for the raffle, and when the luncheon was over, a photographer took a group picture of the General, the Mayor, the prominent members of the club, and the ladies. In January, she called again at the Mayor's office to ask an-

[a] Asa G. Candler was born in 1851, in Varroll County, Georgia. Received a common school education. Moved to Atlanta in 1873, and has resided there ever since. He was at first engaged in the drug business, and afterwards became the proprietor of valuable formulas—among them the soda-fount beverage known as Coca Cola; and has engaged actively in the manufacture and sale thereof. He is perhaps the wealthiest man in the Southern States, and owns large real estate interests and other interests in Atlanta, Baltimore, New York, Boston, Chicago, Denver, San Francisco, Los Angeles, and many other places. He is noted for his public spirit. He gave $1,000,000 to Emory University and donated the site on which the present great University stands, near Atlanta. He erected the building and endowed Wesley Memorial Church and Hospital in Atlanta, and has contributed to many other notable charities. The only political office he has ever held is that of Mayor of Atlanta, to which he was elected in December, 1916, and which he now holds. He belongs to a distinguished Georgia family, one of his brothers, Warren Candler, being Bishop of the Methodist Episcopal church, and Chancellor of Emory University. Another brother, Milton Candler, now dead, was a leading member of the Georgia Bar and some time a member of Congress. Another brother, John S. Candler, was some time a Judge of the Superior Court of Georgia, which position he resigned. Mr. Candler has been prominently identified with every great movement for the upbuilding of Atlanta in the last twenty years. He is usually referred to as Atlanta's first citizen.

other official favor, and a month later, meeting him on the street, made an appointment with him to receive her the next Monday about a complaint which she had made against an officer of the Humane Society. When at three in the afternoon she entered the office, she complained of the heat, took off her hat and coat and sat down in a chair near the Mayor. Very soon she jumped up and said there was a man at the window. The Mayor said it was probably a window-washer; but she replied, "No, it is a well-dressed white man." Then she went to the door and let in an individual whom the Mayor had never seen before, and who, as he entered, called out, "Ah, Honorable Mayor, this is nice." Observing that Mrs. Hirsch was crying, and, feeling that a trap was being laid for him, Mayor Candler ran out and down the stairs to the floor below, where one of his sons had his office, and in a couple of minutes was back in the room, accompanied by his son. Mrs. Hirsch was still crying, but the man had disappeared. To the Mayor's question, "Who was that?" she replied, "That was Mr. Cook, who visits at my mother's, where I sometimes see him. I think he is in the real estate business." With this she left the room and the building.

The Mayor at once telephoned for his friend and confidential advisor, Mr. Adair, who came at once. He had just arrived when the Mayor was called over the phone by Mrs. Hirsch, who said she was at her husband's office, and wanted him to come there. The Mayor thereupon authorized Mr. Adair to represent him, and refused to see Mrs. Hirsch, and did not see her again until she appeared in court in March.

Mr. Adair answered Mrs. Hirsch, and told her Mr. Candler would not see her, but he would if she would come to his office, to which she agreed, and came there in a few minutes. She related to Mr. Adair the incident of the man at the window, and Cook's coming into the office, and said that when she got to her husband's office, she found a note there from Cook, asking her to call him up before he went home. She said her husband was out of town, but would be back that evening, and if he got that note he would probably kill her, or Mayor Cand-

ler, or sue her for divorce. Mr. Adair then, by phone, got Cook to come to his office, and told him that he represented Mr. Candler. Cook said he was a close friend of Mr. Hirsch, and he had just found out things about the wife that shocked him; that Candler was an old hypocrite, and that he would not talk with anyone but Candler about the case. So a meeting between the two was arranged for the next day, in Mr. Adair's office. There Cook told the Mayor that, suspecting Mrs. Hirsch, he had set out to watch her, and had at last found her in a compromising position with him. He said he had been a bad man, had gone all the gaits, but had recently got religion at one of Billy Sunday's meetings; that he was determined to protect his friend, Hirsch, and that unless the Mayor would get the woman out of town, so that she would never see her husband again, he would expose him.

That afternoon, Mr. Adair communicated to Mrs. Hirsch the demand made by Cook. She said it was pretty hard for a woman to have to leave a good husband such as hers, and that she certainly ought not to be asked to leave him and her friends in the city unless she was well provided for. Mr. Candler was very rich, and she thought she ought to have bonds and securities which would bring her at least $3,000 a year. That she was like Mayor Candler, very philanthropic and charitable; she worked a lot in this way, but never had money to do what she wanted. And considering this, she thought he ought to be especially liberal, as his whole reputation would be gone if it ever came out that he had been caught with her in his office in a compromising situation. And also, she would like to have about $5,000 to pay her husband's debts. This was only right, as she was going to leave him. Then Mr. Adair had several more interviews with Cook, in which he reiterated his threat that if Mayor Candler did not get Mrs. Hirsch to leave town, he would expose her to her husband.

The object of the two was now sufficiently revealed for Mr. Candler to go before the Grand Jury and ask their indictment for blackmail. A true bill was at once returned, and Cook was put on trial first. Mayor Candler told his story, and denied

absolutely the charge of immoral conduct made by Cook and Mrs. Hirsch. He was followed by Mr. Adair, who told of the conspirators' demands as they were made to him as the representative of Mr. Candler. Two nurses at a hospital where Mrs. Hirsch had been a patient for some weeks, testified to Cook's calling on her nearly every day[b], and the proprietor of a cafe, and one of his waiters testified that the couple visited it together on several occasions, remaining there several hours, and choosing a part of the room where they would not be likely to be observed.[c] A taxi-cab driver swore that Cook had offered him $200 if he would get him a pass-key to the second floor of the Candler building.[d] And two witnesses swore that he had told them that he had a good scheme to make a lot of money.[e]

Cook called no witnesses, but made a statement to the jury. He said he had known the Hirsches for a long time; that Mrs. Hirsch was an intimate friend of his mother and sister; that on January 3d, being in the Candler building, he saw her and the Mayor going into the Mayor's office, and as the door closed, saw him put his arm around her; that he peeked through a mail slot in the door and saw him kissing her; that he then determined to watch her; that he happened to be on the street on February 4th, and heard them make an appointment for February 6th; that on that day, as he went to the scene, he met two friends, Smith and Lee, and invited them to come with him, telling them that something was going to happen in the Mayor's office; that while Smith went out on the stone coping to look in the window, he and Lee looked through the mail slot in the door, and all of them saw what Mrs. Hirsch said had occurred in the office.

But Smith and Lee were never produced at the trial. No one knew anything about them, and as they were probably myths, and Cook's story a lie from beginning to end, the jury

[b] Kate Taylor, *post*, p. 643; Jean C. Waldon, *post*, p. 644.
[c] Al H. Martin, *post*, p. 644; C. H. Hicks, *post*, p. 644.
[d] Bill Baldwin, *post*, p. 644.
[e] R. A. Gorden, *post*, p. 644; M. C. Kiser, *post*, p. 644.

very promptly returned a verdict of guilty on all the counts of the indictment, and the male blackmailer was sentenced by the judge to pay a fine of $1,000 and to work at hard labor on the public roads of the county for the term of twelve months.

THE TRIAL.[1]

In the Superior Court of Fulton County, Atlanta, Georgia, February, 1918.

HON. BENJAMIN H. HILL,[2] *Judge.*

February 27.

An indictment had been previously returned by the Grand Jury against *W. J. Cook* and Mrs. Herman H. Hirsch, for blackmail. It contained three counts: 1, conspiring to blackmail; 2, accusing of crime for the purpose of extorting money; 3, threatening to accuse of crime for the purpose of extorting money.

John A. Boykin,[3] Solicitor General; *Reuben R. Arnold,*[4] and *E. A. Stephens,*[5] Assistant Solicitor, for the State.

John R. Cooper,[6] and *James S. Bedgood,*[7] for the Prisoner.

[1] *Bibliography.* The Atlanta *Constitution,* February 28, 1918; The Atlanta *Journal,* February 27, 1918.

[2] HILL, BENJAMIN HARVEY. Born, 1849; graduated, University of Georgia, 1869, and in law class, 1871; admitted to Bar in 1871; Solicitor General Atlanta Circuit, 1876; United States District Attorney Northern District of Georgia, 1885; Chief Judge Court of Appeals of Georgia, 1906; resigned to accept Judgeship of the Superior Courts of the Atlanta Circuit, 1913.

[3] BOYKIN, JOHN ABNEY. Born Edgefield, S. C., 1877; received his education in the schools of Edgefield, S. C., and the Edgefield Academy; admitted to Atlanta Bar, 1896, and practiced law there until 1916; Solicitor General of Atlanta Circuit, 1917.

[4] See *ante,* p. 189.

[5] STEPHENS, EDWARD ALEXANDER. Born 1872; student Emory College (Oxford, Ga.), 1891-1893; admitted to Bar, 1895; removed to Atlanta, 1909; Assistant Solicitor General, 1910-1918.

[6] COOPER, JOHN RANDOLPH. Born Lawrenceville, Ga., 1865; received a common school education at Logansville; graduated University of Georgia, literary department, 1889, and law department 1890; admitted to Bar, 1890; has resided in Macon, Ga., ever since, engaging in the practice of law; has never held any public office.

[7] BEDGOOD, JAMES RICHARD. Born Dooley County, Ga., 1868;

Mr. Bedgood moved for a change of venue on the grounds of the unusual calling of a special session of the Grand Jury to indict the defendants when said jury had adjourned; also that the public mind has been prejudiced by sensational headlines in the evening papers on the day of the indictment; also that the reputation, character, influence and standing as mayor of the city, wherein resides nine-tenths of the population of Fulton County, and the great financial standing of Asa G. Candler, render it unlikely that the defendants can secure a just and fair hearing such as they are entitled to; also on the ground of inflammatory articles against the defendants which have appeared in the daily papers, and an editorial which appeared in The Constitution. Said editorial, it was claimed, was prejudicial to the defendants and said that it would not require a jury to clear Asa G. Candler with his own people.

The motion was denied by the COURT.

A demurrer was filed on the grounds that the bill of indictment does not charge blackmail definitely enough; does not state the charge clearly, and does not put the defendants on sufficient notice as to what charge they have to enter defense against. It was also pointed out that the indictment does not state whether or not Candler was married at time of alleged occurrence, but does state that Mrs. Hirsch was married.

The COURT overruled the demurrer.

The *Counsel for Defense* filed a motion to quash the indictment, because V. H. Kriegshaber, one of the grand jurors, was disqualified by reason of the stock he holds in the Georgia Railway and Power Company, of which corporation Asa G. Candler is a stockholder.

The COURT overruled the plea.

The *Prisoners* thereupon pleaded *not guilty*.

The *Assistant Solicitor* said that they would sever the cases and elect to try Cook first.

The following jurors were selected and sworn: H. B. Barnett, George L. Hancock, John Barber, W. A. Brown, W. A. Brower, C. W. Dennis, A. K. E. Edwards, S. C. Forrester, R. L. Ezell, F. J. Briggan, R. R. Ingram and W. W. Jackson.

THE WITNESSES FOR THE STATE.

Asa G. Candler. Am mayor of this city; I usually occupy the mayor's office in the morning, and my own in the Candler building in the afternoon. In the summer of 1917, Mrs. Atkinson called at my office and introduced the prisoner to me; they said they were getting up a raffle of an automobile for the

admitted to Bar, Colquitt County, Ga., 1892; has held no public office.

benefit of the Red Cross, and had been told that it would be against the law, and they wanted authority from me to go on with it; I told them to go on, that they would not be interfered with, in my opinion; I saw Mrs. Hirsch later, at a luncheon given by the Rotary Club, to General Swift and his staff; the ladies were selling tickets to the members for the raffle; there was a photograph taken in which General Swift, myself and some of the ladies appeared; I had nothing to do with this picture or the arrangement of the faces; after that, Mrs. Hirsch called on me a time or two in my office in the Candler building, wanting to talk to me about the raffle, and making some statement about the difficulties she was having in disposing of the tickets; in all those conversations with her when she called on me, she never did anything to indicate to me she was other than a lady; last January she made visits to the mayor's office with Mrs. Rambo, and they wanted to have a change in the humane officer; this event this indictment grows out of occurred on the 6th of February; before that time, had seen Mrs. Hirsch twice; on February 4th I walked to the mayor's office and got in front of where the old Weinmeister hotel was, Mrs. Hirsch spoke to me, coming out of M. L. Thrower's real estate office, in the corner of the Grant building; have understood Mr. Cook stayed in that real estate office. Mrs. Hirsch asked me could she see me in my office in the Candler building. I told her I would not be there that Monday afternoon, and my future engagements were on my memorandum book and I would look and see when I had leisure. She asked me then if she could see me Wednesday afternoon; I stated I got back to the office from three to half past three o'clock; she said, "Must I come at four o'clock?" And I said, "All right," she said she wanted to call about the Humane Society; did not see her any more until she came to my office Wednesday afternoon. I reached my office somewhere about three o'clock; she came in the front door, there is a lock on the door that locks from the inside, you cannot open it from the outside, when it is shut it locks. When she came in she complained of being tired and hot and removed her coat and sat down right near me at my desk. There is a center table in the middle of the room. On the other side of the room from my desk is a settee. Mrs. Hirsch suddenly sprang up and said there was a man at the window back of my desk; looked at the window, but saw no man, I said it was probably a window washer. She says, "No, it is a well-dressed white man." Nobody was there that I could see, I looked back at Mrs. Hirsch. She had gone to the front door and opened it, and in the meantime had pulled her hat off. When she opened the door the man she called Cook walked in, this defendant; had never known him or seen him to my knowledge. When he came in he said, "Ah, Honorable Mayor, this is nice." I said to Mrs. Hirsch, "What does this mean?" Then I rushed to my son's office. I did that because I was alone and I needed somebody, or thought I did. It looked very much like I

had been trapped. I ran to his office on the floor below and ran back with him; was gone probably a minute. When I got back Cook was gone; Mrs. Hirsch was in my office crying; I left her crying; she began to cry before I left. When my son and I got back don't recollect what she said except in answer to my question, "Who was that?" she says, "That is Mr. Cook," that she had seen him at his mother's and sister's, "I visit at their home, and I see him casually there, I think he is in the real estate business with Thrower." She did not stay there more than a minute or two after my son came. She asked me, "Is this your son?" I says, "Yes." I then took up my telephone and called my friend, Forrest Adair, and my brother, John S. Candler, to come immediately to my office. After Forrest Adair got there, Mrs. Hirsch called me up on the phone. She said she had gone to her husband's office and wanted me to come there; told her I would let her know in a few minutes. I turned the matter over to Forrest Adair to represent me, and I have not seen the woman any more since then, until this time. Thursday morning went to Forrest's office to hear what Cook had to say; he would not see me except alone, and he told me what he was going to do. He claimed he had been watching my office; that he was a friend of Mr. Hirsch, and that he had suspected the virtue of Mrs. Hirsch, and therefore was watching Mrs. Hirsch, that he saw her come to my office and come in there, and had seen me with her in a compromising position. I had to restrain myself when he made the statement. He went on to tell me how he had seen me in the office. I denied that he had seen any such thing at all. I restrained myself because I did not want to lose my temper. It was all I could do to do it. He said he had been a man of the world, had no faith in anybody's religion, but recently had a change of mind, and it was a great shock to him, because he knew what I stood for. He opened his memorandum book and showed me a badge, saying he had served as an usher at the Billy Sunday meetings.

Mr. Cooper. We object to everything on the subject of character that has been said or may be said at this time, as we have not offered the character of defendant, and I don't think it would be competent for the State to prove the character of the defendant here by the prosecutor, either by confession or by any other means.

The COURT. Objection overruled.

Mr. Candler. He said he had been a man of the world, had gone all the gaits, and that he was shocked now at this, and he intended to expose the whole thing. I told him he had nothing to expose. He told me that he expected to meet Mr. Hirsch, that he was his friend and was determined to protect him, and there was but one way that would keep him going immediately to Hirsch and that was that I get this woman out of town, and that she should never see her husband again, and that I get a written statement from her to that effect. He said: "Then it would stay in my breast alone." Saw him in the Mayor's office

the next Wednesday, the 13th, he walked up to the Mayor's desk. I said, "What do you want?" He says, "You are trifling with me, I have given you reasonable time, now I will give you till Friday, if this thing has not been done, I will expose you and the whole of it,"—the thing of getting Mrs. Hirsch out of town. I said, "That is not an easy job, separating a man from his wife." He said, "I will take the blame," and I told him to go. I then immediately communicated with Mr. Arnold, and I told him to do what he was going to do to prosecute the case immediately.

Mr. Cooper. I object to that and move to rule out the communication between lawyer and client, the advice he gave, it is against public policy.

The COURT. Objection overruled.

Cross-examined. I don't remember saying to Mrs. Hirsch the picture would not be complete unless she was in it, or telling her to come beside me. I don't remember seeing this picture before; that is my picture beside Mrs. Hirsch, taken in September, 1917. There are two men standing there, General Swift and young Willis Timmons, president of the Rotary Club, who presided over the meeting. I did not say anything to Mrs. Hirsch that caused her to come to my side. I didn't have anything to do with arranging the picture; have no recollection of removing a badge from my coat and presenting it to Mrs. Hirsch; don't believe I did, I might have. Remember she told me her physician advised her she would have to go to the hospital, that was before Christmas. I didn't see her then until January when I met her on the street. She spoke to me as she came out of the Candler building. I don't think my hand was on her shoulder; might have told her I was glad to see her, it would have been courtesy to have said something of the kind. She visited my private office in the Candler building, before the first of January, not since she came out of the hosptal; visited it once or twice on Red Cross missions; never took liberties with her; never kissed her and hugged her; never tried to persuade her to have intercourse with me on any occasion; took no liking to the woman, she was pleasant, attractive. Both times she was wanting me to assist in these things I have just told you; never told her she was the main woman in the Red Cross mission, or best worker. I think I said something about her working too much, and had worked herself down, it would have been natural for me to have said so, when she told me she was going to a hospital; never made a speech at her request at some club about raising money. I did not introduce her; introduced Mrs. Atkinson and Mrs. Atkinson introduced Mrs. Hirsch. I did not say in introducing her to the Rotary Club, "This young woman is the flower of Southern womanhood." I made an engagement with her to come to my office on February 6, at four o'clock. No one was in my office when she came; did not lock the door when she came in; the door was shut. There is a ledge to my window outside, so one could walk around. There are

two windows to that room. The transom was not closed over my door. There are shades to the windows, but they were up. She was not in my office exceeding ten minutes; did not take any liberties with her. I suppose I shook her hand when she came in, receiving her cordially. I did not embrace her or take any liberties at all with her, nor get her on a lounge; was not having intercourse with her when Cook came in, she was not on the lounge in my office. Cook did not catch me. She took off none of her apparel, that I know except, except her coat and hat. These bloomers were not found in my office by Mr. Cook that I know of. They did not come off Mrs. Hirsch that I know of; did not on that or any other occasion take any liberties with Mrs. Hirsch. Mrs. Hirsch never made any demand on me for money on that or any other occasion. Mr. Cook never made any demand on me for money at that time or any other time; never paid Mr. Cook or Mrs. Hirsch one dollar. Since February 6, I have not seen Mrs. Hirsch till this morning, and have had no conversation with her; she has made no demands on me for money; never heard of two other witnesses being there at the time, as you say, I was caught. I didn't say at that time, "Oh, Lordy, Lordy." My breeches were not unbuttoned. Mr. Adair is a real estate man, who is a very close friend of mine of many years. He handles our property, a good deal of it. Cook and Mrs. Hirsch never demanded any money of me, not a cent, the next day afterwards, nor any other time. Mr. Adair represented me in talking with these people; he was my representative entirely.

Forrest Adair. Am in the real estate business, have been engaged in that 39 years; have known defendant Cook for about three weeks. On the 6th of February I was requested by Mr. Candler to come up to his office in the Candler building, and went there immediately; found Mr. Asa Candler, Sr.; his brother Judge John S. Candler, and his son, Mr. Asa Candler, Jr. Mrs. Hirsch called up on the telephone, and Mr. Candler answered. I called the number, a lady answered, and I asked if it was Mrs. Hirsch, and she said it was, and I told her who I was and that I would like for her to come over to my office and have a talk with me. She first demurred, and asked me if I could come down there and I told her no, or if Mr. Candler would come down there first, and I says, "No, I will meet you at my office." So she said that she would come. I left Mr. Candler's office and went down to my office and in a very few minutes there Mrs. Hirsch came in. I asked her what all this meant, and she told me that she had made an appointment with Mr. Candler on the Monday previous to talk with him at his office, and that she was there and while with him she saw a man at the window and made an outcry, and Mr. Candler remarked, "'Tis probably a window washer," and she then stated, "No, it was a white, well-dressed man," and that she got up and went to the door into the hall and opened the door and that Mr. Cook came in and surprised them. And that after she had left Mr. Cand-

ler's office, she went down to her husband's office and that upon reaching her husband's office she found a note. This is the note she gave me. (The note is dated February 6, '18. "H. H. Call me at Ivy 164, before you go home this P. M. without fail. Cook.") She said her husband had gone to Rome that morning and would return about seven, and if he got that note he would probably kill her and then go after Mr. Candler to kill him, or else would sue her for divorce, and that she was very much perturbed over it. Called Mr. Cook, asking him to come to the office, and carried him back in the private office, called Mrs. Hirsch and my brother, George. I stated, "I represent Mr. Candler and I want to talk with you."

Mr. Cooper. I object to what Mr. Forrest Adair said. Of course whatever the defendant said is admissible. I mean the defendant on trial. I am contending that what Mrs. Hirsch said is not admissible, but your Honor has ruled against me. I object to what Mr. Adair said on that occasion.

The COURT. The whole conversation is admissible as part of the *res gestae.* Everything that occurred between these three parties or four parties is admissible as a part of the whole transaction.

Mr. Adair. Mr. Cook arose and said, "I didn't know that this was what you wanted to talk to me about or I should not have come." And he got up and started towards the door, with a nod of the head he motioned to me and I caught the hint and opened the door and went out with him and left George and Mrs. Hirsch in the room. When we got to the room adjacent our general office I said, "Cook, what is it you want, what is it we are up against?" and he says, "I don't care to discuss this matter in her presence, nor do I care to discuss it with you; I will talk to old man Candler and nobody else." He says, "I have just found out some things that shock me a great deal." He says, "This is not her first offense. Her husband is one of the best friends I have ever had in my life, and Mr. Candler, like a good many others, is just an old hypocrite, and I won't talk to you about it, I will talk to him and nobody else." I told him if he wished to talk to Mr. Candler, I could probably arrange an appointment, and I would undertake to have Mr. Candler at my office the next morning at half past eight, and he said if I would do that, he would come to my office when he found Mr. Candler there and would talk to him. He says, "I will tell him what he has got to do." I said, "Why don't you tell me and let me communicate it to him?" He says, "No, I will tell him personally what he has got to do." Then he left the office and I went back into the room where George Adair and Mrs. Hirsch was. Told Mrs. Hirsch I had arranged for this appointment in the morning between Mr. Candler and Mr. Cook. After that appointment was over I would communicate with her and have her to call me up. The next morning Mr. Candler came to the office. I called Mr. Cook over the 'phone and told him Mr. Candler was in my office, and we were ready for him to come over. He said that

he had changed his mind, and that he had decided he would not come to my office. I said, "Let us not talk it over the telephone; suppose you leave your office and meet me on the Whitehall street viaduct in a few minutes." He said, "All right." I left my office, we walked out on the sidewalk. He said, "I will arrange a place to meet him, I don't want to talk to him in your office or his office. I will talk to him in the place I suggest." I told him he could not have any suspicion about meeting him in my office. We had a private room there and it would be all right, and after some persuasion on my part he went up in the private office where Mr. Candler was and shut the door and they remained in there for some time, and Mr. Cook left without coming back through my main office, but opened the door of my private office into the hall and left the building. Mr. Candler reported to me what Mr. Cook demanded of him to do. I then, in response to a telephone message from her made an engagement, brought her to my office that afternoon and my brother George and I talked to her. Told her that Mr. Cook had demanded he arrange for her to leave town, and her husband or he would expose her; she said that was pretty hard to demand she should leave her home and husband; told her Mr. Candler was not demanding it, it was Mr. Cook's demand of Mr. Candler. Asked Mrs. Hirsch what kind of a man Mr. Hirsch was, she told me he was a pretty cool determined sort of man, and that if Mr. Cook did go to her husband she didn't know just exactly what he would do; she said, "Whether he would immediately kill me and then probably go and try to kill Mr. Candler, or whether he would sue me for divorce and name Mr. Candler as co-respondent."

Mr. Cooper. I object to what Mrs. Hirsch said about her husband on the ground that he was a cool courageous man and so forth, it doesn't bind the defendant Cook on trial.

The COURT. Objection overruled.

Mr. Adair. She said, "As between the two, rather than risk my husband's taking one or the other of these steps, it might be better for me to leave, but I certainly ought not to be required to leave my husband and my home, and all of my friends here unless I were properly provided for." Up to that time I had not in any way mentioned money, never. Cook was the first who suggested her leaving her husband. She said, "Mr. Candler is very wealthy, he has given a good deal to charity, he is a philanthropist and he ought to be willing to provide liberally for me. I would rather talk to him directly about this." I assured her, as I had before, that Mr. Candler would not talk to her and would only deal with her through me. She said, "If you put the situation on that basis, I am going to be mercenary. I have to be provided with everything I have now. My husband gets a good salary of $300.00 a month as insurance agent; he has some other income from property and I have a good home." She said nearly all his income he spent on her, and if she left Atlanta and quit him, she thought

she ought to have a sum of money or securities, bonds, that would yield her at least $3000.00 a year. She explained she had an engagement to go that afternoon to a card party with a lady who had been a very dear friend of hers, and that she would come back to the office after. That broke off the conversation. She claimed Cook came upon her and Mr. Candler in a compromising position. I asked her what it meant, if Cook had merely interrupted them in the office when they were sitting talking, and she said, they were not sitting talking, but that after she got into the room that Mr. Candler began to fondle her and that had gone along until she had removed a pair of silk bloomers that she had on, and that she was lying on the couch in the office; that they were having intercourse; she said she went to the door and turned the knob and just as she turned the knob Cook pushed in. She didn't give any explanation why she opened the door, and let Cook in. The next meeting was that evening when she came back from the card party; she said she had been thinking the matter over and that it was all right; she would do what Cook had demanded and leave the city provided she was furnished with securities or bonds that would yield her the sum of $3,000 per year. We asked her then if she simply wanted an annuity at the rate of $250.00 a month, and she said, No; that for several reasons she didn't want that—if she left Atlanta she wanted to leave no mail address; she wanted money or bonds and that if she got an annuity Mr. Candler might die in 6 or 12 months and the annuity stop and she knew Mr. Candler with his philanthropic spirit and nature would not want her to leave her husband and after doing so want her to go to work again or live in a hut; that she was 38 years old and probably would not be able to get herself provided with another home and that she would insist upon the principal of that sum being paid to her in cash or bonds. She said she had been noticing Mr. Candler for years very closely and that she had admired him for the great things he had done; that she had cut out of the papers clippings about him and she appreciated how much he meant to the city of Atlanta and to the state of Georgia and the South, and that if anything happened and Mr. Cook should tell Mr. Hirsch and make this public that it would hurt Mr. Candler very greatly—not only socially and politically, but in a business way; that Mr. Candler had been very prominently connected with the church and in every way and for that reason Mr. Candler should deal with her very liberally in this matter. I called Mr. Cook Saturday and told him I would like to see him again. He first said he would not see me, but finally agreed I should come by Thrower's office for him when I got back into the city after 2 o'clock; we walked down Forsyth street to a point opposite the fire department where we sat down upon a stone and talked. I told Mr. Cook he was doing wrong and that I wanted to see if there was not some way to get him to drop the matter and not insist upon Mr. Candler sending Mrs. Hirsch out of the city. Mr. Cook said "he was very much worried

and nervous over the matter; it had distressed him greatly. He said he himself had been a very bad man; that he had committed every crime except murder; that he had left his home and father when he was 12 years of age."

Mr. Cooper. I object to this. We wish to register an objection to this testimony on the ground they cannot put in a separate and distinct offense against the defendant other than the one on trial.

The COURT. It is not a separate and distinct offense; I overrule the objection.

Mr. Adair. He stated that up to about 6 months ago he had been in the habit of drinking two quarts of whiskey a day. I told him I didn't believe a man could drink two quarts of whiskey a day.

Mr. Cooper. We object to that and I make the motion now to rule out about him being a habitual drunkard or anything of that sort. That is certainly a separate and distinct offense.

The COURT. If anybody was charging the defendant with those things I would sustain your motion, but the defendant is talking about himself according to this witness; I overrule your motion.

Mr. Adair. He stated he got to where whiskey didn't have much effect on him when he would drink absinthe, which was a stronger drink, but he had taken quite an interest in the Billy Sunday meetings and that he was now trying to do right, and that as he saw the right, his conscience had dictated to him to protect his friend Hirsch from living with such a woman as Mrs. Hirsch was and that "If Mr. Candler doesn't do what I told him to do, I have told the old man what he has got to do, if he doesn't do it, I am going to my friend Hiney Hirsch and tell him about this woman." Mrs. Hirsch told me the first afternoon at my office that Mr. Hirsch was expected back from Rome that afternoon at 7. The next day she told me he had not returned, but that her husband would be back on Friday afternoon at 7. So at the time I was having this talk with Mr. Cook Mr. Hirsch was in the city. Cook told me Mrs. Hirsch had been unture to her husband and that Mr. Candler had intercourse with her in Mr. Candler's office. As I left him he put his arm upon my shoulder and says, "Now, Forrest, you tell old man Candler just to go ahead and do what I have told him to do and then eat a good supper and go to sleep and not worry over this any more; if he will do that, I will forget everything. I will not even think, I will not tell it, I won't even think it." Mrs. Hirsch had told me that her husband would be in the city that evening and was going to visit Pittsburg, the home office of his company; that he would be going there Sunday on the noon train. At 1 o'clock Sunday Mrs. Hirsch called me and said: "I have just put him on the train at 12 o'clock and he has gone to Pittsburg and while he was here I stuck to him like Grant around Richmond;" told her I would communicate with her when I wanted to see her again. Met Cook again on the street on Monday; Cook started in again telling me about what a bad man he

had been. He said, "I told you Saturday I had committed every crime except murder. I kept a woman when I was 15 years old, working in the Southern shops." He says, "Before I was twenty, I was arrested in bed one night; a fellow came in and caught me with his wife, and I was arrested for rape and carried to the station house. I got out of it by being able to prove that the fellow was never married to her; he was keeping her himself; and I got in a row with the master mechanic about it; he was also friendly with the woman; and it resulted in my discharge by the master mechanic; the higher authorities investigated it, and reinstated me and moved the master mechanic up into some other department; the master mechanic took me into his room one day and told me if I said anything more about it I would have to eat his gun; he would kill me. I told him, I am not afraid of anybody killing me; start that right now"; he told me about his experience with the wife of another railroad official in Tennessee, where he had surprised him one night in bed with his wife; Cook had gotten his pistol and stuck it right in his eye and backed him out of the room, and he left there, and that woman had followed him all over the country; finally one reason he came back to Atlanta, he knew that woman would not follow him to Atlanta; he finally grew very impatient, and says, "I don't want any more arguing about this damn case; it has worried me about to death; I cannot sleep; I have to go to the barber shop every day and get my hair shampooed and get my head rubbed; it has worried me to death thinking about my friend Hiney Hirsch"; he says, "I saw him and her together Saturday night, and it was all I could do to keep from going right up to him and telling him, and I ducked so he would not see me, and got out of the way; I am not accustomed to ducking people; I don't want to hear arguments from you; not another damn word; I have made up my mind that has got to be done; I told old man Candler I would give him a reasonable time; I think I have been more than reasonable; if he don't do it I am going to hunt Hirsch up the minute he comes back into this town, and tell him what occurred in Mr. Candler's office"; I arranged then for another conference with Mrs. Hirsch; had Mr. Asa Candler, Jr., to come to my office Tuesday morning at 8:30, and shortly afterwards Mrs. Hirsch came in; she was at first very much surprised, seeing Mr. Candler there, and said she was not being treated right in drawing so many people into it; Mr. Cook had told me Thursday morning Mr. Candler had made a hell of a mistake in taking a whole lot of people into his confidence and telling this thing around, and he said, "The first thing you know, it will get out"; I told him it would not be talked out through us; he asked me how many knew it; it was a great mistake; he would rather have dealt with Mr. Candler directly, without bringing all these people into it; she at first talked a great deal about how hard it was for a woman to have to give up her husband and her home, and that the woman was usually

made the goat, but that Mr. Candler was a good man, and she felt very strongly and affectionately for him; she admired Mr. Candler; she said she had thought a good deal about Mr. Candler's great work; that she had always had a great desire to do charitable and philanthropic work herself, but she had never had the means, the money, to do it, and it had always been her ambition to be in a position where she could not only have the personal touch with the people with whom she was working in a charitable way, but at the same time be in position to furnish the money to carry out the things that she might decide were best and most charitable; that being true, that she thought that Mr. Candler could well afford to be extremely liberal with her, and because it meant so much to him, he was such a prominent man in every walk of life, in every phase of his life, and she had come across a clipping where he had given Emory University a million dollars; she said, "I think he would be getting off light if he gave me half that sum, $500,000"; she said that she wanted a sum that would about pay to her husband some debts he had made on her account, that she didn't want to leave him like a piker, and that she wanted to deposit in bank to his credit a sum that would put him through, and it would take $5,000; there was no paper on the table, but the morning Constitution, and she wrote on the margin of the Constitution three figures, $1150, $1300, $1500; she stated one of these, the $1150, represented money that her husband had expended incident for her operation in the hospital a few months previous, and that the $1300 represented a sum that he owed to an insurance company, and that $1500 represented a mortgage on a piece of property that he owed, and then, without adding them up, she wrote $4350, and then underneath that wrote $150, and says, "I cannot figure them all up now, but I figured them all up the other evening, and they amount to $5000, and I want that sum to deposit for him"; (the piece of paper torn from the Constitution testified about, is identified as Exhibit "B" by the reporter); she says, "Now, when I leave my husband I will leave a deposit book showing this $5,000 deposited to his credit in the bank; that is to be with the farewell note"; I stated to her we would have a further conference among ourselves about it and would let her know later what we would have to say, and she left the office; I had no authority or permission to pay her anything, or Cook, either; I never offered her anything; after that, I never saw her or Cook, either, any more, until this morning; I didn't have any authority from Mr. Candler to offer these people one penny, and I didn't do it.

Mr. Cooper. I want to register one more objection to all this testimony; I object to the conversations that occurred between Mr. Adair and defendant and Mrs. Hirsch, upon the further ground that any conversation that occurred between the defendant and Adair could not bind the defendant on trial because he is not the prosecutor in the case; he is a third party,

called in to quash this matter or settle it.

The COURT. Register your objection, and register the fact that it is overruled.

Cross-examined. I am in the real estate business, and the firm of Forrest and George Adair does a great deal of business for Mr. Candler; Mr. Candler has been a friend of my family for a great many years; for the past several years we have done a great deal of business for him and with him; I don't think there is a man in the State of Georgia in whom I would take a greater interest or for whom I would do more than I would for Mr. Candler; this is the first time for a good many years that I am entirely out of Mr. Candler's debt; my first knowledge in connection with this case was when Mr. Candler called me to his office; I don't think I ever met Mrs. Hirsch before; I think I have seen Mr. Cook; was called in by Mr. Candler; he did not want to get me to hush the matter up; he asked me the first question, what I thought of it; I told him I believed, from my experience with him, and from other cases, the blackmailers considered him their legitimate prey; he did not call me for the special purpose of getting this matter hushed up; this is the sixth time it has been attempted on him; he said he would like to put the matter entirely in my hands; Mr. Candler has not hysteria on the subject of blackmail; on the contrary, I think he has more sense on the subject than any man I know of; but they have been after him so much he knows blackmailers now by this time when he sees them; he is becoming an expert.

I didn't say and don't say I can look into a man's face and tell whether he is a criminal or not—blackmail is a crime. I don't say I can look in a woman's face or look in Mrs. Hirsch's face and tell whether she is a criminal or not, but I do say where all the ear marks show so plainly, it is easy to judge.

Mr. Cooper. I object to that; it is a matter of argument.

Mr. Adair. I think I made every engagement for a conference with Cook and Mrs. Hirsch. Mr. Cook never did call me up and make an engagement to talk about this matter. On the other hand he insisted he didn't want to talk to me; he wanted to talk to Mr. Candler direct.

I don't know that Mr. Candler had ever seen Mrs. Hirsch or had a conference with her since the time it was claimed he was caught in the office. I could not say of my own knowledge, but I don't believe he has seen her since that time. I have had this whole matter absolutely in my hands. Mr. Candler turned it over to me. I did not want to get this woman out of town. I did not lay a trap to catch this woman in. I did not persuade her or lead her to believe in all those conferences that I or we would pay her a big amount of money. I was treating with her, not to get her out of town but to develop her game. I was not treating with her on the different occasions on the idea of paying her to leave town in order to get this matter hushed up. I was telling her what Cook demanded in order to develop the scheme fully, the plot and the game.

I stated to Mr. Candler in his office before he turned the matter over to me that it was a blackmail scheme. I did not jump at the conclusion they were guilty of blackmail. I arrived at the conclusion it was blackmail before it was turned over to me and I have been of that opinion ever since. I did not jump at the conclusion after it was turned over to me. I knew about the case before it was turned over to me. I did not see the woman in his office. Mr. Candler related to me what had occurred before it was turned over to me, he related the circumstances.

I did not know about the facts in this case until it was turned over to me, except as related by Mr. Candler.

Of these two the first I called into my office was Mrs. Hirsch. I called her to come to my office when I was in Mr. Candler's office, before I ever left there, within twenty minutes after I reached Mr. Candler's office that afternoon, Wednesday.

My purpose in calling her to my office was, she had just called Mr. Candler over the telephone and Mr. Candler having turned the matter over to me, I wanted to talk with her and not have her talk to Mr. Candler and I made the engagement with her to have her come to my office and talk with me. She came and then she unfolded the whole case to me at my solicitation.

I did not ask Mrs. Hirsch how much she would take to leave town. I have tried to make that clear. I never asked her at that time or any other time how much she would take to leave town. We told her Mr. Cook had demanded of Mr. Candler that she quit her husband and leave town. I did not offer her any inducement to leave town. I did not suggest we would pay her to leave town or intimate we would pay her to leave town. I didn't offer her anything to leave town. I never had any idea of offering her anything to leave town. I did not offer Mr. Cook anything to get her out of town.

As to how come we to say anything to her about going away from her husband and her home when Mr. Cook made the demand of Mr. Candler that she leave her husband, he was his particular friend and leave town, there was not anything else left for us to talk about in developing a plot as that was the principal part of it, no other part and parcel but the crux of it. There was nothing else said in that meeting between me and Mrs. Hirsch that I remember.

The next meeting with Mrs. Hirsch was after she returned from the card party that same evening between five and six o'clock.

She stated at this noon meeting that she would have to leave the office then and go to this card party, that she wanted time to think a little over it, she would go out to the card party, and she would return to our office after the card party was over. She wanted time to think about the things Cook had demanded of her, leaving her husband and her home and going out of town. I talked to her on that matter of what Cook had demanded, and she said she would consider the matter and talk with us further about it, after she returned from the card party.

When she returned from the card party, money was talked about then. She stated that if she left her husband and left town she would have to have a sum of money or securities or bonds that would yield three thousand dollars per annum.

After the conference was over I told her we would take it under advisement, and see her further.

As to the question, if we led her to believe on that occasion that we would let her have some money if she would leave town, I don't think we led her to believe it, Mr. Cooper, but in developing the plot we avoided it as much as possible, or doing anything that would arouse suspicion, because I wanted to keep them going until they got to the end of it.

The next conversation with Mrs. Hirsch after that was on Sunday over the telephone when she told me her husband had arrived in the city and had also left that Sunday. I thought you included telephone conversations in your question. I requested her to call me over the telephone.

Then the next personal conference I had with her was on Tuesday morning when Asa Candler, Jr., was present. That was the last conversation I had with her. The reason I called Asa Candler, Jr., in, my brother George was on the other conference, and I called Asa Candler, Jr., to hear what she had to say on the last conference, and she met us at the last conference at my solicitation.

I did not on that occasion hold out any inducements to her that we would pay her money if she would leave town. I think she thought she was going to get it. I don't think it required any making to get her to believe she was going to get it. I think they thought they were going to get it.

I have narrated the first and second conference with Cook; the third conference was Saturday afternoon when we walked from Thrower's office down to the lower end of Alabama street, and it was held there nearly opposite the headquarters of the Fire Department. I met him at Thrower's office, but had no conversation with him there, I did not go in Thrower's office. He never made any demand on me for money on that occasion. He was standing at the entrance of Thrower's office, and there are plate glass doors there, and no private office in Thrower's office that I know of, and I motioned to him, and he came outside immediately to the sidewalk and we walked off down the street to talk.

I never suggested to Cook he get the woman out of town. I never offered him anything to get her out of town; Cook was the man who wanted us to get her out of town. I never did offer Cook any money to get her out of town nor for any other purpose, and Cook never made any demand for money on me to get her out of town.

I controlled these conferences, and Candler had nothing to do with them. I mean Mr. Candler, Sr. The conferences I had with Cook were in the absence of Mr. Candler. The demand of Mr. Cook on Mr. Candler was made directly to him and in my absence. No demand was made on me in the absence of Mr. Candler.

On that occasion the purpose of the meeting was I was trying to get Mr. Cook to recede from his demand that he had made of Mr. Candler, that Mrs. Hirsch be forced to quit her husband and leave town. That would have hushed it up and saved Mr. Candler, my friend, that is your question, that would have hushed it up.

The next conference I had with Mr. Cook was on the following Monday morning, I made that engagement myself. I met him at Thrower's office and we walked down Walton street. I had the same purpose then that I had before. No demand was made on me by Mr. Cook for money. He never made any demand on me for money. His demand was that we get this woman out of town, and he said he would give Mr. Candler reasonable time to do it.

Mrs. Hirsch's demand for money was not made with any reluctance at all when we told her Mr. Cook had demanded that she leave town. Mrs. Hirsch for herself and on her own account demanded money from us, on the last conversation, and the second when she first talked about leaving her husband. She did that in response to what we had told her as to what Mr. Cook demanded. She said she loved her husband and knew what it would mean if she did leave her husband. It was in response to what I told her Cook demanded that she said anything about money.

I had no other conference with Cook. Cook didn't demand any money of me at any time.

On the last conference I had with Mrs. Hirsch, when she got to the point where she named the sum, the conference closed and she was indicted in about 48 hours; we developed their trap; as to what I will get in this matter, I will get Mr. Candler's and others' friendship and thanks; as real estate agent, we handle trades on commission, and it depends on how much business I do for him as to how much I make out of him; some years we make ten thousand dollars, and some years a great deal more out of Mr. Candler's business; some years we probably make a hundred thousand dollars in trade with him on commissions; we have made that; I am not getting a cent out of this blackmail case; simply the consciousness of having done my duty to a friend, is pay enough; my conscience don't hurt me in this blackmailing business.

I never heard anything about that picture until I saw a part of it in the paper. I know what she told me about herself and Mr. Candler. I don't know what else she might claim to have occurred. The part she told me about Mr. Candler, if it is true, would be most unfavorable.

I don't go into the secret recesses of Mr. Candler's soul, and know what he does.

She did not state to me on these occasions that Mr. Candler took a liking to her and admired her body. She did not state to me that he thought more of her than anyone working in the Red Cross. She said she admired Mr. Candler very much, but she never spoke of Mr. Candler having any admiration for her, but told me she admired Mr. Candler.

Kate Taylor. Am a trained nurse; nursed Mrs. Hirsch at

the Davis-Fisher Sanitarium for one week, in December, 1917; Mr. Cook called on her every day during the week I was nursing her, except one.

Jean C. Waldron. Am a trained nurse; nursed Mrs. Hirsch at the Davis-Fisher Sanitarium last December, for four days; Cook came to see her twice out of the four days during which I nursed her.

R. A. Gordon. Know J. W. Cook; about two months ago he came to my office and told me he was going to Cincinnati, and wanted an introduction to some wholesale whiskey houses up there; he was going to bring it back here and sell it; saw him again about a week after that, and asked him if he had been to Cincinnati; he said he had a better scheme than the first one to make money.

Al H. Martin. Run a soda water and cigar stand and cafe opposite the court house; on the day this indictment was found, February 14th, was at the county jail, I saw a lady in the office of the jail talking to a reporter; they said she was Mrs. Hirsch; also saw Mr. Cook in the office in the same room; had a conversation with him; I says, "Cook, they've kind of got you messed up, haven't they?" he says, "No"; he asked me what the comment was in regard to his case; I says, "I don't know, Cook; I have been very busy and haven't had time to read the papers"; he said he had got Mr. Candler—caught Mr. Candler; had him dead to rights, or something to that effect; I asked him if the woman in the office there was the woman he used to come in my store with; he said she was not; up to about three weeks before this indictment I had seen them coming in my store, Cook and Mrs. Hirsch; they were in the store a great deal for a period of two or three weeks; sometimes they would come together, and sometimes they wouldn't; sometimes they would sit over in the far corner; have seen them sit in other places at tables, always in that balcony; the balcony is considerably more private than the balance of the cafe; they have to go upstairs to get to it; I have seen them during the dinner hour, somewhere in the afternoon about this time, come and sit quite a while; sometimes they would come in to supper and sit quite a while; I have known them to come as late as four or five o'clock in the afternoon, and stay until eight and nine at night.

M. C. Kiser. Am in the real estate business; know Cook; a week before this indictment had a conversation with him; he said he was going to build some houses, make some money or bust.

C. H. Hicks. I formerly worked in Al Martin's cafe; remember Cook and Mrs. H. H. Hirsch stayed at our cafe one Sunday night until after 9 o'clock, almost the time we close, which was 10; they were up in the balcony of the cafe.

Bill Baldwin. Am a taxicab driver; know the defendant, J. W. Cook; on the 26th of January, 1918, he had occasion to ride in my taxicab; Cook asked me to get him a master key for the second floor of the Candler building in Atlanta; he offered me $200.00 to get the key for

him; the next morning he came to me again, and again offered me $200.00 to get him a master key to the second floor of the Candler building; he said that he wanted to get a paper in an office in that building; he said there was a party who had not toted fair with him, that if he could get this paper, he could get half out of a certain trade; told him I would have to think the matter over and made him no promise.

Mrs. J. Frank Snelgrove. I know Mrs. H. H. Hirsch; also know Cook when I see him; in October, 1917, at the Fair in Atlanta, saw Mrs. Hirsch and Cook eating at the Fair; Mr. Cook was eating a piece of pie, and he handed it over to Mrs. Hirsch, and she took a bite off of the same piece of pie he had been eating.

T. C. Erwin. Am Vice-President of the Third National Bank of Atlanta; know Mrs. H. H. Hirsch; about two days before the indictment was found, Mrs. Hirsch came to see me about investments; she said she would have some money pretty soon, and would like to invest it properly, and would like to get me to assist her to do it, and I told her I would be glad to do it; she did not say how much she was going to have.

J. D. Bazemore. Am night jailer at the Fulton County jail, and have been such ever since the defendant Cook and Mrs. Hirsch have been arrested; Mrs. Hirsch and Cook have been together, with their attorney, Bedgood, six or seven times at the jail office since they have been in jail; they conferred together in the jail office.

V. H. Young. Am a special officer in the employ of the Retail Credit Merchants' Association, and work in and out of the retail stores on Whitehall Street; know Mrs. H. H. Hirsch; on the Saturday before she was indicted, she came up to me and said, that she might need me on Monday and might need me very badly, and to kindly give her my phone number, so that she could get me, and she says, "when I call you, come to me with bells on."

THE PRISONER'S STATEMENT.

Cook. Gentlemen of the Jury: First, I want to deny any conspiracy and any charge of blackmail. I have never in any way or at any time or place, asked anything of Mr. Candler or of any of his agents. I met Mrs. Hirsch possibly a couple of years ago or more. I helped her conduct an automobile raffle for the benefit of the Red Cross. We associated together every day. In that way I learned very much of her and her being a woman of affable disposition; she is a lady that you would seek her company. We disposed of the automobile for the benefit of the Red Cross. She in time visited my home, and was always welcome with my sisters and mother until Wednesday, January 23d. I happened to be in the Candler building, coming from M. C. Kiser's office, which is on the third floor. Coming from the office that way towards the elevator, I saw Mrs. Hirsch in Asa G. Candler, Sr.'s office. I thought nothing of it until he put

his arm around her before he closed the door. Well, I stopped; I thought for a second I would walk over to his office door leading into the hall, and he has a mail slot in his door with a spring slot that you can shove up from the outside and see everything in his office. I saw him pull Mrs. Hirsch down in his lap and kiss her. The elevator was running, and I let the slide down and walked down for a step or two, went back and looked again, and they were still in the same position. He was sitting in a little chair just next to his office desk, a desk chair. I left the door again and shoved it up and they were standing close to the door; seemingly, apparently she was going towards the door. I left. I lived about a hundred years from that time on until the real happening, but I made up my mind then and there if that kind of people was deceiving the world, I was going to know it at least for my own satisfaction. On Monday morning that he claims he met Mrs. Hirsch on Forsyth Street, I was sitting at Jim Whitten's desk in M. L. Thrower's office, which has a big plate glass all around. I saw him standing there talking, Mr. Candler had her right hand in his hand and had his other hand patting her over on the shoulder on the street. I immediately got up and walked out into the lobby right across the street, and Mrs. Hirsch's back was towards me, and I slowed on by them and went into the Dago stand and bought a cigar, and I heard Mr. Candler say, "Wednesday." I said, "Then I'll be a watch dog Wednesday," and Wednesday afternoon I went on watch; just before four o'clock I saw Mrs. Hirsch coming up James Street towards the Candler building, and a couple of friends of mine, Mr. Robert Lee and Mr. Smith, were coming down Peachtree, and I stopped them and I says, "Boys, you want to see something?" They says, "I don't know; what is it?" "Well," I says, "something that's going to happen in the Mayor's office, I think, and I want you to see it." I told them what I thought was going to happen, and one of them said, "Yes, I'd climb a telegraph pole to see that for the sport of it." And she went into the Candler building, and we went in right behind her, and took a different elevator and went to the fourth floor. I said, "Now, let's give them time before we see what they're doing." We walked down the steps from the Candler building, from the fourth floor to the third floor, walked into an office, a multigraphing office next to Mr. Candler's private office, and Mr. Smith says, "We want to measure this window here, which is the outside window on Pryor Street." There's a coping around that building about four feet at least, with very little slope to it. I says, "I'll get out on the coping; you fellows can look through the mail slot." Smith says, "No, you know them better than I do and I don't want them to catch me. I'll get out on the coping." So Mr. Lee raises the window and Mr. Smith steps out there, and I went back to the door, and by the time I got back there, Mrs. Hirsch was lying on the lounge on the left of his office from the door, with her clothes up and Mr. Candler in the act of fornication. All at once they jumped, grabbed her coat and hat, and this pair of bloomers, and started out the door, and when she opened the door I was standing in it, and she threw up her hands and says, "My God!" I says, "Our little society lady and our

Honorable Mayor! You are a nice pair!" I saw this bundle lying on the floor with her coat and hat, and I reached down and got it, and walked out and went by her husband's office and left him a note to see me before he went home or to call me. I didn't hear anything from him, but I heard from Mr. Forrest Adair. I went over to Mr. Thrower's office, and Mrs. Hirsch called me up from Mr. Candler's office, and says, "Mr. Cook, won't you please come back up here—Mr. Candler wants to talk with you?" I says, "I have no business up there," and hung the phone up in her face. It wasn't long until Mr. Forrest Adair called me. Says, "Cook, can you come over to my office?" I says, "Why, certainly!" I went over there. When I saw what he wanted, I says, "I refuse to discuss another man's wife with you or any other man." He asked, would I talk to Mr. Candler, and I finally told him I would. I met Mr. Candler over there. I met Mr. Forrest Adair twice after that. Every time that I met either one of them was at Mr. Forrest Adair's solicitation. I never at any time in any place in any way tried to communicate with them or made any demand on them for anything whatsoever; and, gentlemen, I am not asking for mercy, but strict justice. I thank you.

THE SPEECHES TO THE JURY.

Mr. Arnold. Gentlemen of the Jury: You are trying now the man responsible for this sad affair. The woman is almost as much of a victim as is Mayor Candler—for she was simply a tool in the hands of the prisoner, and for that she deserves our sympathy. It would have been ridiculous for a man to have committed the act the defense accused Mr. Candler of, with both blinds to his office up and an open mail slot in his door. Although Cook had named two mysterious men as witnesses, in his statement to the jury, the defense has not placed these men on the stand as witnesses, or produced them at all. Where are this Lee and Smith, who went with him to climb outside of an office building window and watch and eavesdrop? Even Mrs. Hirsch does not take the stand to sustain him. There she sits, with not a word to say.

This man Cook claims to be so tender with "his friend" Hirsch, yet he arranged an audience for two strangers for the violation of his friends's wife. The truth is, the plot is yet on. Mrs. Hirsch is wildly infatuated of this man Cook, and this, gentlemen, is the use he has been making of her. Selling her purity to make money. Of course, she was the one who made the demands. Cook is too wise to make them himself.

No, he makes the woman do all the dirty work—while he occupies the proud position of a friend of her husband's. Cook and Mrs. Hirsch had made all arrangements. Cook wanted them to "get her out of town," did he? Cook would surely have joined her later. Suppose she had gotten as much as $100,000? What a time they would have had! And, poor Hirsch. What a footmat they have made of him. Then Cook would have denied ever knowing Mrs. Hirsch, if it hadn't been for Al Martin's visit to the jail. When Martin recognized Mrs. Hirsch as the woman who had accompanied Cook to his cafe, the story had to be changed, so Cook admitted his previous acquaintanceship with Mrs. Hirsch. And he claims to be a friend of Hirsch's. Poor Hirsch. What can not we expect husbands to be called upon to stand if this thing is overlooked? Cook, the saintly friend of the husband. I dare state right here, gentlemen, that he was a much closer friend of Mrs. Hirsch than he was of Mr. Hirsch. Cook was a casual friend, was he? Daily visits to the hospital look like it, don't they? A husband could not have done more.

Mr. Candler is deserving of the thanks of the community for having the bravery to prosecute this case openly and without fear. Many a man, no matter how innocent, would have paid the price the blackmailer demanded. Blackmail, morally, is worse than burglary. It is a shame that the laws of Georgia make the penalty so light. They treat it as the smallest of crimes and yet it is the meanest, dirtiest crime I know of. Then look at the remarkable coincidences in the statement of the defendant. He just happened to pass and overheard the conversation. Remarkable coincidence. She walked out from Thrower's office. Another coincidence. They have the same lawyers. Another remarkable coincidence. Gentlemen, this is a cruel case. It is cruel on the poor husband and cruel on Mr. Candler. It is cruel to see the poor woman used as a tool by a man like Cook. A man who admits that he has committed every crime on the calendar except murder, and if abortion is murder he has committed that.

He makes a most remarkable statement, yet doesn't produce a witness. No one, on oath, you will notice, has dared to state that Mayor Candler and Mrs. Hirsch had these frequently mentioned improper relations. Here is Cook, who immediately rushes round to the husband's office to nobly tell what he has seen. He leaves a note on the husband's desk saying, "See me at once." This is on Wednesday. Yet the husband is in town from the following Friday until Sunday and Cook never told him anything about it!

Gentlemen, that note business was all arranged. Think of the bravery of Mrs. Hirsch in going to get that note. Oh, yes, she saved a shooting by a jealous husband, no doubt. Never a fireman rushed into the scorching flames with greater bravery than she displayed. Why did Cook tell Mr. Adair all this stuff about the terrible crimes he has committed? To make himself out a terrible fellow and scare Mr. Candler, as he thought. Gentlemen, the workings of the criminal mind are sometimes very strange. He wanted to impress upon the Mayor that he was a dangerous man; he thought his hair would stand on end with fear. It was camouflage of the most transparent variety. The worst thing that Cook had done, the meanest, lowest thing of all, was to bring an article of woman's underclothing into this court room and flaunt it in the eyes of the public, to show it and then not put it in evidence. I don't believe for a minute that he got that garment from the floor in the office, as he says he did. He has had time to get dozens of pairs since then. He could have bought a pair, or the woman could have given him a dozen pairs.

Pretty soon my old friend Cooper is going to talk to you. He is running for the United States Senate. He is going to make you an old-fashioned campaign speech. I hope you've all got your umbrellas ready to keep off the spray.

Here they are, trying to drag in the mire the reputation of one of Georgia's foremost citizens, known far and wide as Atlanta's "first citizen," a man whose activities are all constructive, who has erected colleges, endowed universities, con-

tributed to every philanthropic enterprise, and always stood for the highest and best things in public and private life. Shall we tear him down for a man who admits and boasts that he has committed every crime on the statute books except the crime of murder—a man who brags that he provided for a woman when he was fifteen years of age—who brags that he drank two quarts of liquor a day until Georgia went bone-dry—a man who brags that he was tried for assault and tells about the time a husband caught him invading his home? Shall we tear down Asa Candler to further the scheme of a man who does not stop with his blood-curdling record, but drags this woman into a blackmail attempt?

The record of Mr. Candler has been a splendid one. His career in Atlanta has been constructive and not destructive. He has helped to make Atlanta what she is today, and to think that a creature like this Cook should have the effrontery to try to tear down the record of a man like Asa G. Candler! Asa Candler is not a difficult man to approach. He is just everyday folks, like you and me, despite all his money. He is open to this kind of sneaking attack, by reason of his very type of plain, everyday man. Mayor Candler is an old-fashioned man and transacts business in an old-fashioned way. Anybody can go to his office and see him. Mrs. Hirsch took advantage of this habit which he has always followed, and laid her plans which Cook had formulated. She is Cook's victim and doesn't know it. Since this blackmail case came up, I am afraid to let a woman come into my office, and I am a poor man compared with Mr. Candler, and only a moderately good man as compared to him. There is no telling how many men in Atlanta are paying blackmail and keeping their mouths silent. But Mayor Candler had the nerve to fight, even though he knew they would smirch him from head to foot. No one is safe from the blackmailer of this type, but I am thankful to say that I believe after this case, because of Mr. Candler's bravery, that blackmailers will roost a little lower in Atlanta. We don't know how many good men have paid up and kept quiet in the past. No

one is safe. But it is actions such as Mr. Candler's which make it safer for others.

The crime of blackmail does not depend on the truth of the charge alleged by the blackmailers. Even had Candler been guilty, the blackmailing would still have been a crime.

As to the photograph of a group containing Mrs. Hirsch and Mr. Candler, I believe that Mrs. Hirsch was groomed for the affair by Cook even before that photo was taken in September, 1917, and that they had laid their plans before that date. But I don't believe she is responsible. She is Cook's victim.

In this case, my only regret is that the penalty provided in law is not commensurate with the gravity of the offense. This case does not stand on feeling, prejudice, politics or religion. It stands solely on justice.

Mr. Cooper. Gentlemen of the Jury, this is the second time in my life that I have had the honor to appear in this county in defense of civil liberty. Before I appeared in the old courthouse, and surely I feel it an honor to appear in this beautiful new temple of justice. I am not surrounded by the glamor of such a reputation as my brother Arnold enjoys, and I am not spurred on to my duty by a client worth $50,000,000. I have not had the opportunities of my brother, but if I can help it I am not going to let him harm a hair of this man's head.

Mr. Arnold is known the length and breadth of the land. Out in Utah I saw a man who looks like him, and I asked him what they raised out there. "We raise hell sometime," he said. And that is exactly what brother Ruben is doing in this case. He has jumped into the case and raised hell. We are up against one of the best criminal lawyers in Georgia, and one of the shrewdest. Mr. Boykin represents the great state of Georgia. Mr. Arnold represents filthy lucre. If it hadn't been for Mr. Forrest Adair there wouldn't have been any case made. There are few blackmail cases in the law books and in all these cases either money or checks had passed. Remember, no money or anything representing

money has been passed in this case. Even Mr. Adair admits that there was no demand made for money either by Mrs. Hirsch or Cook. That clears Cook. What will we do with him? Release him! I'm not surprised you won't try the woman. You would have little enough sense to try her, for you know there's not a jury in Georgia that would convict her. What act can they show against Mr. Cook that constitutes blackmail? None! What overt act have they shown that Cook has done to make him guilty of blackmail? None in the world! There's a great deal of difference between blackmail money and hush money. We have heard a great deal from Forrest Adair about hush money. He trapped this woman when he held out great amounts for her to leave her husband, and as soon as she agreed the books were closed and the law set upon her. If that was not a trap to catch her, I don't know what I am talking about. The woman is the only sufferer in this case. Her home has been destroyed, her husband—I don't know what he thinks about it—but her conscience hurts her when she thinks of him. They say it doesn't make any difference if Mr. Candler committed this act, they have got a case against her and Cook anyhow.

Do you think (holding up the photograph) that he was a party to that? And when he told her, "Come in here, this picture won't be complete without you," I don't blame him for saying it—I like her myself. I like any pretty woman. I'm no saint. I'm just a plain, ordinary citizen. I'm telling you, gentlemen, Candler was caught. Because of his standing and reputation in this community, something had to be done. Candler was ill advised. When they had the grand jury called in special session and had these people indicted in a misdemeanor case, he was ill advised.

I was a witness to a lynching once in a Georgia courthouse. I was engaged in the Rawlings case in Valdosta in 1906. I did not want to see anything like that repeated in a Georgia courthouse, and that's why I asked for a change of venue this morning.

Did you ever hear of a grand jury being called in special session in a misdemeanor case? This is an extra misdemeanor, because there's millions behind the prosecution. I am representing a poor man here today, hear his call. You've heard the other side. Now hear his. There's no case been made against him. The only case made against him is that he butted in where he wasn't wanted.

This is just a case of a man caught in a wrongful act. If he had been an ordinary man, you'd never have heard of it. He is the man, not Cook, who is responsible for dragging that poor woman into this courthouse. Let us do right in this case though the heavens fall. Let us give Cook a fair deal.

THE CHARGE TO THE JURY.

JUDGE HILL, reading the code section under which Cook was indicted and enumerating the counts against him, instructed the jury that it was immaterial whether or not Mr. Candler is guilty, as alleged by the defense; that the question for the jury to decide was whether Cook and Mrs. Hirsch conspired to bring about a situation whereby they could accuse or threaten to accuse Mr. Candler of this offense for the purpose of extorting money. If either was guilty of the conspiracy charge the other was equally guilty and the jury was authorized so to find. There is no accessory to a misdemeanor, but all are principals and it was immaterial whether a threat or demand was made directly upon Mr. Candler in person or upon a representative of Mr. Candler. If Cook simply found Mr. Candler in the situation he claimed and made his charges, without reference to any conspiracy, either to Mr. Candler or his agent and suggested that the whole thing could be hushed up by extortion of money, the jury was authorized to find Cook alone guilty. It is not necessary for any actual demand to be made. If the accusation or threat to accuse was made for the purpose of extorting money from Adair, Candler or other agents of Mr. Candler, the jury should find the defendant guilty. Mr. Adair had the

right to use any means within the law to find out the purpose of the accusations or threats, and the methods used would not affect the innocence or guilt of the defendant.

THE VERDICT AND SENTENCE.

The *Jury* returned after an absence from the court room of twenty minutes with a verdict of *guilty*.

JUDGE HILL sentenced Cook to twelve months at hard labor on the public roads of Fulton County and a fine of $1,000.

THE TRIAL OF MRS. HERMAN H. HIRSCH FOR BLACKMAIL, ATLANTA, GEORGIA, 1918.

THE NARRATIVE.

Less than three weeks after the conviction of her confederate Cook (*ante,* p. 624), Mrs. Hirsch was brought to trial. Mayor Candler (*ante,* p. 629) and Mr. Adair (*ante,* p. 633) repeated the amazing story which they had testified to on the trial of Cook. And the other witnesses on Cook's trial gave similar evidence here. Then Mrs. Hirsch, the Court having been cleared of all spectators, made a long statement or address to the jury in which she stuck to the charge of criminal conduct which she had made against Mayor Candler and in which she attempted to make it appear that the money which was talked about in Mr. Adair's office was not a demand made by her but an offer on the part of Mayor Candler's agent to hush up the matter and keep it from the public. But in less than half an hour after the Judge had charged them on the law of the case, the jury came back into court with a verdict of guilty and Mrs. Hirsch was sentenced to a fine of $1000 and imprisonment for one year.

THE TRIAL.[1]

In the Superior Court of Fulton County, Atlanta, Georgia, March, 1918.

HON. BENJAMIN H. HILL,[2] *Judge.*

March 14.

Mrs. Herman H. Hirsch, who had been jointly indicted with W. J. Cook for blackmail, and had pleaded *not guilty*

[1] *Bibliography.* The Atlanta *Constitution,* March 15, 16 and 17, 1918.

[2] See *ante,* p. 628.

(Cook having been tried separately and convicted, see *ante*, p. 654) was placed on trial today.

John A. Boykin,[3] Solicitor General, and *Reuben R. Arnold*,[4] for the State.

Richard B. Russell,[5] *John R. Cooper*[6] and *James S. Bedgood*[7] for the Prisoner.

The following jurymen were selected and sworn: R. L. Crawford, W. H. Blackstock, L. C. Berry, J. T. Carroll, W. L. Holcomb, V. R. Hollis, C. A. Meager, J. R. Lee, M. B. Hinton, Jacob Heiman, J. T. Stark, H. L. Dewell.

THE WITNESSES FOR THE STATE.

Asa G. Candler. (His evidence in chief was substantially the same as that given on the trial of Cook. See *ante*, p. 629.)

Mr. Russell. Did you buy any chances on the automobile raffled by Mrs. Hirsch? Yes, I took several chances at her solicitation, though I do not remember exactly where or when I bought them, but my impression is that I bought them at the Rotary luncheon in the Piedmont hotel. Do you recall Mrs. Hirsch laughingly make the remark to you in your office, when you bought some of the tickets, that you were an accessory before the fact? I do not. When Mrs. Hirsch spoke to you on James Street, in front of the Candler building, wasn't she across the street from you? Yes, I think she was. Did you not cross over and tell her you were glad to see her out of the hospital? I think I did cross the street, and I might have made some such remark. Did not you tell her you had tried to call her on the phone while she was in the hospital? I did not; I never telephoned her, or wanted to telephone her, on any occasion; my recollection is that she always did the calling. When Mrs. Hirsch called at your office in the Candler building on Wednesday, February 6, did you ask her to sit down? Perhaps I did. Didn't you remark that it was warm, and ask her to remove her coat? I did not.

Mr. Russell. When she called

[3] See *ante*, p. 625.

[4] See *ante*, p. 189.

[5] RUSSELL, RICHARD BREVARD. Born, Cobb County, Georgia, near Marietta, 1861; graduated, University of Georgia, 1880; admitted to Bar, 1880; Solicitor General of the Western Circuit, 1888-1896; Judge of Superior Court, Western Circuit, 1898-1906; Associate Judge Court of Appeals, 1906-1916; member of Legislature, Clark County, for a number of years; he now resides at Winder, Georgia.

[6] See *ante*, p. 628.

[7] See *ante*, p. 628.

you on the telephone in regard to the Rotary club luncheon, didn't she ask you to speak? Perhaps, I don't remember for certain. And then didn't you tell her you would introduce her at the Rotary club if she would come by your office, and give you a "great big hug?" I did not. Didn't you ask her for a photograph in the presence of an Atlanta lady when she and the lady went to your office to see you about the humane officer? I did not. Did Mrs. Hirsch, on these various occasions, when she visited you, come alone, or in company with anyone else? Most of her visits were made to me in my office in the Candler building, and she came alone. Did you object to her coming to your office alone? I did not. Did you ever suggest that she bring someone with her? No. Did you ask her, when you met her on the morning of February 4, about her fever blister? I think I remember that I noticed she had a fever blister. Did you not take off your Rotary guest badge and pin it on Mrs. Hirsch? I have no recollection of doing so. After the Rotary luncheon, did you not ask Mrs. Hirsch if she did not think you had earned your reward? I did not. I merely told her that she had done her part well.

Mr. Russell. On that first visit did you not put your arm around Mrs. Hirsch and pat her on the back? I did not. Didn't you solicit improper relations? No, I did not. Didn't you attempt to persuade her that no embarrassing consequences would follow? I did not. Are you worth fifty million dollars? No.

Mr. Arnold. I object.

JUDGE HILL. The question is improper; it makes no difference whether Mr. Candler is rich or poor.

Mr. Russell. When Cook unexpectedly appeared in the doorway of your office on February 6, didn't you wring your hands and exclaim, "My God, I've got to confess?" I did not. Nor did I ask Mrs. Hirsch for a conference with Cook in my office, and saw him only in Forrest Adair's office and in the mayor's office in city hall; Cook never called up and asked for a conference; Mrs. Hirsch had not called me up or written me since the affair of February 6, and had never to my face accused me of improper conduct with her, nor has Cook demanded any money.

JUDGE HILL. It is immaterial whether improper relations existed between Mayor Candler and Mrs. Hirsch; a person is guilty of blackmail, whether the charge on which the extortion is founded is true or untrue.

Forrest Adair. (His evidence in chief was substantially the same as on the trial of Cook. See *ante*, p. 633.)

Mr. Russell. How many other women scrapes have you settled for other people?

Mr. Arnold objected to the question.

Mr. Russell. I wish to show the witness an expert in handling this class of cases; I want to show the experience of this detective.

JUDGE HILL. Change the question so as to make it deal with other blackmail cases involving the mayor.

Mr. Adair. I had handled other blackmail cases for Mayor

Candler; I did not set any trap for Cook or Mrs. Hirsch, but simply did all I could to develop the plot, which I believed had been laid.

Mr. Russell. Were you sorry for her when you said you were? Yes, and I am yet. Didn't you wipe your eyes and pretend deep sympathy, and squeeze Mrs. Hirsch's hand, and say, "Little woman, I am mighty sorry for you?" I did not. You've kissed many ladies' hands, haven't you? Many a one. You are a man of the world, aren't you, Mr. Adair? Yes, to the extent that I am a fairly good judge of human nature, from my long business experience. You go round to various places, don't you, in line with advertising your business? No. Well, you've been to several manicure balls?

JUDGE HILL. That question is improper.

Mr. Russell. Did you not make the statement that the woman is usually the "goat," instead of Mrs. Hirsch, as given in your direct testimony? I possibly acquiesced in that statement after Mrs. Hirsch had made it, as it is my observation that the woman usually was. In my experience as a real estate man, I have had many dealings in a business way with women, and as a rule they are poor business people; but there are brilliant exceptions to that rule.

Mr. Russell. Did not Mrs. Hirsch consult you about some property of her husband's six months before this occasion? I do not recall any such meeting, but it is quite possible that she did so, either with me personally, or with my office; Mrs. Hirsch told me that on several occasions her husband had told her that she had only married him in order to secure a good home; she said her husband was of a cold and indifferent nature, whereas she was a woman of strong emotions.

Mr. Russell. Did not Mrs. Hirsch complain as to the number of people who were being brought into consultation on the matter? She did say that she thought too many were being concerned in it, at the conference when Asa G. Candler, Jr., was present. Did you ever send for anybody to represent her at these conferences? No. You never sent for anybody at her suggestion? No. Didn't you tell her that the whole matter must be handled as secretly as possible on account of Mr. Candler? I probably did; I didn't want any publicity until the whole matter had been fully developed. Did you ever tell Mr. Cook anything about Mrs. Hirsch having cried or been affected by the matter? I think I did say that she was much perturbed. Did you tell Cook you were sorry for her? If I thought of it, I did; I was sorry for her. Did you ever say that the Candler family were afraid that Mr. Candler would kill himself? No. Did you tell either Cook or Mrs. Hirsch that Mr. Candler was worried about the matter? I may have.

Kate Taylor (*ante*, p. 644), and *Jean C. Waldron* (*ante*, p. 645), testified as they did on the trial of Cook.

Ruby Allen. Was a nurse at St. Joseph's Infirmary; was in charge of the night watch; met Mrs. Hirsch last fall while she

was a patient at the hospital; have seen a quantity of fruit in Mrs. Hirsch's room at different times; she told me this fruit was sent her by Mr. Cook; Mrs. Hirsch said to me that should Mr. Hirsch ever come and find Mr. Cook calling upon her she would tell her husband that Cook had been visiting a male patient in the hospital and had simply dropped in when passing her room to ask how she was.

Cross-examined. Was in charge of the hospital at night; it would be my duty to eject any persons from the hospital who were guilty of any improper or immoral actions; do not recall what I said in response to Mrs. Hirsch during the conversation about Cook and Mr. Hirsch; did not think there was anything improper or I should have put them out of the hospital; had never seen Cook, but had seen Mr. Hirsch once, when he called on his wife at the hospital.

Al H. Martin. (See *ante*, p. 644.)

Cross-examined. Am a tenant of Reuben R. Arnold's. Cook had visited my cafe on several other occasions with ladies other than Mrs. Hirsch; have seen Cook bring a number of ladies from a dancing school which was located a few doors below, for drinks.

T. C. Erwin (see *ante*, p. 645).

C. H. Hicks (see *ante*, p. 644).

M. C. Kiser (see *ante*, p. 644).

R. A. Gordon (see *ante*, p. 644).

Cross-examined. The second conversation, when Cook said he had given up the idea of selling whiskey, as he had "got something better," may have taken place in the Billy Sunday tabernacle; do not recall certainly; Cook said nothing to me about going into my business, the mattress business.

FOR THE DEFENSE. *March 15.*

W. J. Cook. (His evidence was the same as the statement made by him on his trial. See *ante*, p. 645.)

Mrs. Myra Cook, mother of W. J. Cook, and *Bessie Cook*, his sister, told of their friendship for Mrs. Hirsch and asserted that they had frequently sent her fruit and flowers while at the hospital. Cook carried these presents for them.

Rosa Bell Humphreys. Was in the same cell as Mrs. Hirsch for several days. Sheriff Bazemore tried to get me to make an affidavit that Mrs. Hirsch had confessed that her story about Mr. Candler was false, and offered me money to do so. He said the affidavit would help him politically, if he could secure it.

Mr. Russell. Mrs. Hirsch will now tell her story to the jury and I ask that the court be cleared while she is making her statement.

The JUDGE ordered all persons except the officers of the court to retire, which was done.

MRS. HIRSCH'S STATEMENT TO THE JURY.

Mrs. Hirsch. Gentlemen, I met Mr. Candler, being introduced to him by a prominent lady of this city at his office in the city hall. Last summer the Atlanta Woman's Club formed an auxiliary to the Red Cross and they asked me to be chairman of the finance committee of this auxiliary, and to raise money to donate eighty-five dozen operating gowns to the base hospital, which would require between $800 and $1,000. We decided to raise it by raffling an automobile. I asked Mr. Cook to select the car, as I knew nothing about them. Then the question arose whether the raffle was legal and some of my friends suggested that I consult Mayor Candler. I had never met him, but had heard that he was a very strict church member and rather narrow-minded as to games of chance or gambling or anything of that kind, and I was very much afraid to approach him on the subject. I called a meeting of the Atlanta Woman's Club for the next day and Mrs. Spencer Atkinson was chairman of our auxiliary and we suggested that, in order to get the approval of Mayor Candler, Mrs. Atkinson would accompany me to his office in the city hall and introduce me and we would try to get his co-operation, which was done. Mrs. Atkinson took me down and introduced me to him and we took one of the cards with us, on which was a picture of the automobile being displayed and we told him that we were trying to avoid calling it a raffle; we were simply calling it an automobile campaign for the Red Cross, and in order to keep people from calling it a raffle we had stated down on the bottom of the card, "Donate $1 to the Red Cross and receive the number on one of these cards."

Mr. Candler kept the card in his office, on his mantel, at our request, and bought one of the tickets for the automobile, and gave us a dollar for the ticket. We jokingly told the Mayor that he was made an accessory to this raffle; that if we were prosecuted he would have to be prosecuted, too. Mrs. Atkinson afterwards remarked in a very innocent way to the ladies at the club that "Mr. Candler and myself flirted outrageously in the office" that day. I don't think she meant it really, or anything of that kind, but he certainly did attract attention by putting his arm through her arm and my arm as we came from the office and told her not to tell Judge Atkinson that he had done so.

About three days after that The Journal came out in flaming headlines, that the Atlanta Woman's Club was raffling an automobile. I called up Mr. Candler at the city hall that morning and told him what The Journal had published, and he asked me to come and see him at his office about 3:30. I reached there promptly; he was talking to a man I did not know, and when he left he walked over to the door and closed it, it had a spring lock. He came over to the davenport, where I was sitting, sat down beside me and put his arms around me and made a great many demonstrations in a fond and affectionate way. I resisted his attempts to be affectionate,

but was afraid to resent them, as I should have done, on account of the automobile raffle. He kissed me and put his arms around me; he pulled me down on his lap, and he made every advance that a man could make to show a woman that he wanted to do things that he shouldn't do. I finally got loose from him, went to the door and started out, and said, "Mr. Candler, don't ask me to do something that I shouldn't do and don't want to do, because I am under obligations to you," and I left the office on those terms, after promising him that I would come back to see him again. I didn't go back, but on that visit he told me that he couldn't call me, that I must call him; that he was a public man, and when anybody wanted him on the phone everybody knew who he was talking to, and what it was all about.

The Woman's Club was working as hard as they could to try to dispose of those tickets, but it seemed that $1,000 was awfully hard for us to raise. It was suggested at one of our meetings that we try to get introduced at the Rotary Club at one of their luncheons. Mr. H. P. Hermance was approached on the subject, and he said he would try to get us introduced, Mrs. Atkinson and myself, to the Rotary Club, and ask them to take up this sale. On the morning of the 5th of September, when the Atlanta quota was sent to Camp Gordon, which was the day of this luncheon, on that morning Mr. Hermance called me up and asked me if I had best not put off my visit to the club until the following two weeks' banquet, because they expected to have General Swift and these soldiers there, possibly two or three hundred of Atlanta's people there, and that it would interfere seriously with the business of the Rotary Club, and they didn't think they could consider it that day, but he said, "It's just up to you, if you want to come today—why, do so"; and I said, "Suppose you wait until I call Mrs. Atkinson and ask her what she thinks about it?" which he did, and I called Mrs. Atkinson, and she said, "I think that today is the best time to go, because if the soldiers are there they would be thinking about the Red Cross, and they would most likely be interested in the Red Cross work by the soldiers being present."

I called up Mr. Hermance and told him Mrs. Atkinson's decision, and he said, "That would be a very good thing, too, if you had someone with some prestige to introduce you and get the attention of those men in that way." I said, "How about Mr. Candler?" and he said, "Well, he would be a good one."

I called up Mr. Candler and asked him if he would be willing to introduce us at the end of his speech to the Rotary Club—no, I didn't, I said, "Will you introduce Mrs. Atkinson? She's going to make a speech." His answer was, "I would rather introduce you." I said, "You go on, Mr. Candler, and do what I told you, and I'll give you a big hug the next time I see you." That was the only advance I ever made to Mr. Candler. He immediately agreed to do that.

We went down to the luncheon and were placed near General Swift, General Dunham and Mr. Candler and Mr. Timmons, the

president of the Rotary Club. Mayor Candler introduced Mrs. Atkinson to the club, and Mrs. Atkinson, instead of making a speech, merely introduced me and I had to make the talk to those gentlemen and tell them what we were trying to do. It seemed to meet with their approval and Mrs. Atkinson and myself went to the door and sold tickets to the men as they went out. Mr. Candler though, bought another ticket, which were the only two that he purchased on the automobile. I left the club to go to the Ansley Hotel and put the money in the safe; when I saw they were taking pictures of Atlanta's quota, General Swift and Mr. Candler. Mr. Candler turned round and saw me and said: "This picture isn't complete without this little lady," and he took me by the arm and placed me between him and General Swift and stood up there to have the picture taken by my side. When the picture was completed and they had finished with me, I started on over to the Ansley Hotel. Mr. Candler followed me and removed the badge from his coat lapel—the Rotary badge—and pinned it on my dress as a souvenir of the occasion, and he said, "Did I earn my reward? When are you going to give me the hug?" And I said, "Any time you say; I always pay my debts." He said, "I have got to go out to Camp Gordon this afternoon, and may be late getting back; it may be 4 or after before I get back," he said, "can you come to my office tomorrow afternoon?" I said, "Yes, I will be there tomorrow afternoon," and I went to his office in the Candler building.

The automobile was not discussed. I gave him the hug, but that was all. On this occasion, as on the former one, he made improper proposals, but didn't go to the extent that he did on my former visit. The next time that I called Mr. Candler up, it was a question of a Sunday baseball game. A baseball promoter had told me that if I could get the co-operation of the Atlanta Woman's Club to offer the Sunday baseball game, which was the first Sunday baseball game they had had in a good many years at Ponce de Leon Park, that he would give us half the receipts for the Red Cross. I told him I would go and see Mr. Candler about it. He said, "Mr. Candler was the only person who could tell me whether he could have it or not." I went up in the city hall to see Mr. Candler and asked him about the Sunday baseball game. He said he doubted if it could be put over, that there was a law against Sunday games, but for me to see Attorney Mayson, and if he said it could be done in any form, shape or manner, that he would give it his approval. I called up the baseball promoter and he went with me to Mr. Mayson, and Mr. Mayson got down the law books, or the city ordinance, I think it was, and read where we couldn't have the Sunday game.

The next day I called up Mr. Candler and went down and told him that Mr. Mayson had said it was against the law. I was there some time, and he went through the usual routine of hugging and kissing me, but was not quite so effusive as he was on that first visit, because my health was about on the verge of the breaking point and he saw that I was ill when I went up there. I had

told him in my visits that my doctor had advised me to give up all charitable work and to go into the hospital, that I was in a very serious condition and was nearing the verge of a nervous breakdown, and that I must give up this kind of work, which he suggested that I do, and I said I couldn't on account of being in on this automobile, it hadn't been raffled yet.

I went again to his office to see him about allowing a banner to float across the street. On that day I was so ill in his office that he suggested that I take a taxicab to go home, I was so weak. He asked me how soon I was going to the hospital and I said as soon as I could dispose of the Red Cross. He said, "Will you let me hear from you? I can't call you up because everyone will know it," and I promised him I would, and I never did. I went home and went to bed and was in bed for three weeks before I went to the hospital. Two weeks after I went to bed Mrs. Atkinson and Mr. Cook disposed of the automobile by raffle in the Ansley lobby.

I went to the hospital, was in St. Joseph's for six weeks. I was then carried to Davis-Fischer, was there three weeks before I was operated on. They were building up my constitution at St. Joseph's and at Davis-Fischer in anticipation of this operation. I was able to go around a great deal of the time, I had my clothes on and was sitting about in the yard at St. Joseph's, just, in fact, taking what is called a rest cure. Mr. Cook called to see me almost every day when his mother couldn't come; he came by himself when his sister couldn't come with him. He came there with Mr. Hirsch once or twice and several times he came there either when Mr. Hirsch was there or Mr. Hirsch would come in when he was there.

About a week after I had gone to bed Billy Sunday's campaign was on and I was very much interested and read all of his sermons in the papers and was very much worried because I wouldn't get to hear Billy Sunday, because they told me I would have to stay in the hospital at least three months. Mrs. Cook, the mother of Mr. Cook, was talking to me over the phone at St. Joseph's one day and she said, "Mrs. Hirsch, will you ask Will"—as she called her son—"to go and hear Billy Sunday. We can't get him to go, but you have had such good influence over him that I wish you would ask him to go."

During the automobile raffle Mr. Cook had told me that he was what he called "a rounder" in his life and that he had lived a very, very bad life. One day at the Ansley Hotel, in waiting on a committee meeting, Mr. Cook and I were sitting up in what they call the mezzanine. He told me a great deal about his life, how he had railroaded and how rough he had been and that he had been considered to be and that he had gambled and he had drank whisky and was very, very bad. I told Mr. Cook that I thought that was a very horrible way for a man to live; that there was nothing in life to live like that, and why couldn't he, instead of gambling and drinking and doing all those kind of things, turn his attention to better work. He was very much interested in this Red Cross work at the time and his mother was very much delighted that he had in-

terested himself in it and said that for the first time in Will's life she had seen him interested in something that was to his advantage.

I called Mr. Cook up, at his mother's solicitation, and asked him to go and hear Billy Sunday on the first Sunday that he preached a sermon for men only. Mr. Cook went to hear the sermon and came back by St. Joseph's hospital, and told me he was very much impressed with Billy Sunday, and that he intended to go to hear him again; and his mother afterwards remarked to me that it was mighty hard to get Will to go to hear Billy Sunday at first, but after that it was hard to keep him away, that he went to every meeting that he could go to. He was made lieutenant of reservation of one side of the reservation of the Billy Sunday Tabernacle, to seat people.

I came out of the sanitarium on January 15th and went to live with my husband at the Pickwick Apartment. We took our meals at restaurants. One morning after breakfast, while I was waiting for a street car, Mr. Candler came up and shook hands with me, told me he was mighty glad to see me out of the hospital and he says, "I called you up at your home and they told me you weren't there any more." He said, "When are you coming up to see me?" And I said, "Well, I don't know." He said, "How about this afternoon?" I said, "Mr. Hirsch is in town—this was on Tuesday." He said, "How about tomorrow?" I said, "If Mr. Hirsch goes away I will come up tomorow afternoon, but," I said, "I'll call you up in the morning at the city hall and let you know whether I'm coming or not." I did not call him up until after five o'clock and I told him that I was ready to come up if it wasn't too late. He said, "Well, it isn't too late, I'll be here until 6 o'clock." I went right on over to his office. He had the door open into the room. I can't tell all of what happened during that visit, it's too disgusting. The first part of the visit Mr. Candler was very affectionate, pulled me down on his lap, hugged me and kissed me, but I finally left the office without having consented to do what he wanted. He said he would expect me to call him up or come to see him on the following Friday. I didn't go. I told him at the first part of the visit before when he was so demonstrative that a lady in town, a Mrs. Rambo, had asked me to visit him with her in connection with the Atlanta Humane Society, and I said, "I wish you would get interested in it because it certainly needs somebody's interest, and he said—"oh," I said, "Don't do anything for it just because I ask you, but see Mrs. Rambo." "Well," he said, "Do you want me to do this for Mrs. Rambo or for you?" And I said, "Well, for her, I won't be jealous," and he said, "Well, you can bring her to see me." On the Tuesday following Mrs. Rambo and I went to the office. They talked about the Humane Society.

I told Mr. Hirsch one evening at the supper table that Mr. Candler had made some advances to me when I had been in his office, and I said I had never gone to his office that I didn't go there for the Red Cross or for the Atlanta Humane Society. "Well," he

said, "you cut it out and quit going to his office, now." That was before I went the first time after I came out of the hospital. They have said in their testimony that on Tuesday, the 4th of February, that I met Mr. Candler on Forsyth street—they said on Monday. To the best of my recollection, it was on Tuesday.

When I came through the Grant building that day I came through there because it was cold, and the wind was blowing, and I took the short cut through to get around the postoffice and go up Fairlie street to the Pickwick apartments. I was on my way home. I had no idea Mr. Candler was within a million miles from there, as far as I was concerned—in fact, my mind didn't happen to be on Mr. Candler that morning. As I went through the Grant building my mind wasn't on Mr. Candler at all. I didn't see him until I came right up to him, because I wasn't looking for him. He walked up to me and shook hands, put his around me and patted me on the shoulder, and I had a fever blister on my mouth and he said: "How did you happen to get that fever blister?" And I said: "I guess you put it there about two weks ago when I was in your office," and he said, "Don't your husband put fever blisters on your mouth?" And I said, "My husband isn't as demonstrative a kisser as you are," and we talked about that, and he said, "When are you coming up to see me again?" And I said, "I don't know about that, Mr. Candler, Mr. Hirsch is in town today," and he said, "How about tomorrow?" I said, "Well, he is expecting to leave here about noon tomorrow, and if he does go away, I will come up tomorrow afternoon. If he doesn't go away, I will phone you in the morning at the city hall, but if I don't phone you, you can look for me at 4 o'clock." Mr. Hirsch left town the next morning about noon, and at 4 o'clock that afternoon I went to Mr. Candler's office. He met me at the door, put his arm around me, practically before the door was closed, he closed and locked the door. His first remark to me was, "What do you want to do?" One demonstration followed another until I finally consented to do what Mr. Candler wanted me to do. I had removed my coat when I went into the room, as he said I did, and took off my hat and laid it on the end of the table near the door with my coat. I also removed the articles of clothing, which have been introduced as evidence, and laid these with my hat and coat on the table. It's so hard to go on with. The windows in Mr. Candler's room had double shades on them, and the shades were about a foot from the bottom of each sash; they were lowered to within about a foot of the middle of the sash, and at the bottom of the sash. We were on the davenport near the window. I had my face towards the window, when I saw a man look through the window at us. He was standing outside of the window and his head was even with the top opening of those shades. It frightened me so I jumped up and started to run out of the door. Mr. Candled said, "Don't do that, don't open the door, just hide your face." I turned around and I saw the man again, and he was looking right into the window, he was peering in to see what was happening in the room, and I threw discretion to the winds, and I became

so alarmed at him seeing me that I grabbed the coat and hat and other clothing from the table and started to run out of the door. I turned the thumb bolt from the inside and opened the door, and as I opened the door Mr. Cook raised himself up and said, "There's some one at the door, too." I threw up my hands and dropped what I had in my arms. He made a grab for them, and so did I. He got them and put them in his pocket, straightened up and said some remark—I have forgotten just how it was—"our honorable Mayor," and then walked out and slammed the door shut.

Mr. Candler began wringing his hands and he said, "We are just caught, we will have to confess it, it means ruination." I don't know what I was doing, I was walking up and down the room, I suppose; I don't know what my actions were at all, but before Mr. Cook had closed the door I started to call to him and beg him not to say anything about it because he showed that he had seen what had transpired. Mr. Candler looked at the door, walked around the door several times, and said, "Who is this man?" And I says, "It's Mr. Cook, his family and mine are good friends, and I think the world of his mother and sister; I would rather have the good will of his mother than anybody I know of, because she has been one of my dearest friends, and she is the last person in the world who I would have think anything wrong of me." He said, "I thought it was your husband."

Mr. Hirsch had left that morning for Rome, saying that if he didn't return that night that he would be gone until Friday night, that he would return about 7 o'clock. My first thought was to get to Mr. Hirsch. Mr. Candler said, "What are we going to do about this?" I said, "I don't know; I don't suppose he will say anything about it, maybe he won't." He said, "Who is he, and what does he do?" And I says, "He is connected with Thrower's, I think, because I have seen him in there." Mr. Cook had told me he was associated in the real estate busniess; he had gone into the automobile business, but real estate was really his line. He says, "Well, call him up and ask him to come back and let's talk to him and see what he is going to do about it—get some answer from him." I called Thrower's real estate office and I asked for Mr. Cook; he came to the phone, and I said, "Mr. Cook, this is Mrs. Hirsch; Mr. Candler wants you to come back up here and talk to him." He says, "I haven't anything to say," and slammed the phone shut. Mr. Candler went out of the office, and I put on my coat and hat. He came back with Asa, Jr. His first words were: "Are you going now?" I said, "Well, I guess I better." He says, "This is my son, Asa, Jr., I thought I better have somebody with me." So I left. Mr. Candler followed me out into the hall, and I asked him had he told Asa, Jr., yet, and he said, "I haven't told him yet, but," he said, "you call me up and you'll hear what we are going to do." I went on down to Mr. Hirsch's office. He was to come in at the Union station, and Mr. Hirsch's office is in the Equitable building, which is not far from the Union station. I thought I would go down there where I could sort of compose myself and think, before going

down to the train, which was due at 7 o'clock. When I got down to Mr. Hirsch's office and opened the door, I went in, and when I did found a note that had been tucked through the letter slot. This note had been signed by "Cook," and it is the note that I gave Mr. Forrest Adair. I immediately went to the telephone and called up Mr. Candler to tell him that evidently Mr. Cook was going to try to make some trouble for he had left this note for Mr. Hirsch to call him at Ivy 164 before he went home. Mr. Candler answered the phone; I told him about finding the note and he said, "What was it?" and I read it to him over the phone, and he said, "Well, I'll call you in about ten minutes." In about ten minutes the phone rang and a voice said, "This is Forrest Adair, will you come to my office in the Atlanta National Bank building?" I said, "No, sir, I will not." He said, "Well, I wish you would because it's very important that you do, and it's about something that occurred a little while ago, and I think you'll understand from this what it is and that we are going to try to help you, and I want to talk to you about it." So I consented to go to his office. He seated me there and began to talk about what had happened in Mr. Candler's office. He said that Mr. Candler had made a full and complete confession to him, had told him everything, and he said, "I want to see what we can do to get you out of this."

In a few minutes George Adair came in, and I said, "Mr. Adair, I wish you wouldn't draw so many people into this. It's so embarrassing to have to talk before so many people." He said, "Well, I'll tell you I'm working in Mr. Candler's interests," and he said, "I want to see that he is gotten out of this; we want to find out the straight of it and find out what to do." I said, "It seems to me that Mr. Cook is the one that's going to make the trouble. I'm sure I'm not, I don't want it known. I showed him the note that I had gotten from Mr. Hirsch's office, and he immediately went to the phone and asked Mr. Cook to come over to his office. When Mr. Cook came in and saw me there, he didn't say anything, just turned around and started to walk out. I said, "Mr. Cook, please don't tell on us. Please give me a chance," and he never even answered me or looked at me, but walked on out of the room. Mr. Forrest Adair went out of the room—with him and was gone quite a little while. When he came back he said he didn't know what to think or what to do, hardly, but he had gotten Mr. Cook to promise that he wouldn't do anything that night, and for me to go on home, and if Mr. Hirsch came home to just be with him as much as possible to try to keep Mr. Cook from telling it, and to absolutely deny everything if he did tell him.

I went out—oh, in the meantime, Mr. Adair said, "We'll most likely want to talk to you tomorrow; now how shall I call you up; I don't want to call you up and say that Forrest Adair wants you?" We agreed that he would call up and use the name of one of my lady friends, saying she wanted to talk to me and I would understand by that that it was Mr. Adair, and to go and call him up at once, because at the Pickwick there's just two telephones, one in

the office and one in the public phone and I have no private phone there. The next morning, which was Thursday, about 11 o'clock I got this message, that this lady wanted me. I went down and called up Mr. Adair's number and he said to come over to his office.

Next morning I went to Mr. Adair's office before noon. I had been invited to a bridge party that afternoon at the home of one of my friends; they took me back into the private office, and Forrest and George Adair were in there. They told me that they had been in conference with Mr. Cook that morning, and that Mr. Cook demanded that I leave my home and leave my husband, that no woman like me should live with a man like Mr. Hirsch. I said, "Well, did he ask that Mr. Candler leave his wife also?" He said, "No, that all of his feeling and anger seem to be directed against me and not against Mr. Candler. Forrest Adair says, "Mrs. Hirsch, we are in the same boat, and Cook is steering the boat, and if he were to say that Mr. Candler would have to go, he would have to go to not be exposed, and Mr. Candler couldn't stand to be exposed." I said, "Well, it don't seem fair that I should be the one that should suffer all the consequences of this." He said, "No, but from time immemorial"—these are his very words—"from time immemorial women have been made the goat for men's behavior," he said, "at times I'm ashamed that I am a man, because everything that a man does a woman has to suffer for." Then Mr. Adair then asked me what Mr. Hirsch's salary was, and I told him how much he made and what little income he had, and he said, "Well, if we were to provide for you with an amount equivalent to Mr. Hirsch's salary and give you this much would you be willing to leave here, not let anyone know where you are"—and he suggested Denver as the place to which I should go—"and leave a note to your husband suggesting that you are tired of him or something like that, so that he won't follow you, absolutely closing up associations with your husband, would you be willing to do that?" And I said, "Mr. Adair, I don't see how I could, for all I may have done wrong, my home has been a happy one. Mr. Hirsch and I have never had one cross word—I've heard people say they had been married certain lengths of time and had never had a cross word, and I could hardly believe it, but, it isn't entirely true in my case. Mr. Hirsch is a fine disposition man. He never gets mad and everything that I do seems to be allright with him. He lets me go my own way, do as I like; we have never had any trouble at all, and it looks unreasonable to me I should leave my home like that."

He had mentioned in this talk that the money that they wanted to give me would be in the way of annuity, that they would give me so much on the first of every month; either send me a check or deposit the check to my credit for $250. I said, "Well, if I considered doing such as that, I would have to be assured that I was going to get that money, that I might leave here and you could pay me a check the first month and then after that you needn't pay it any more." Mr. Adair said, "Mrs. Hirsch, the word of Forrest Adair is good; the firm of Forrest and George Adair keeps their

word. You'll be protected, and we'll stand by you, and we'll see that you shall never be harmed, and you shall be taken care of."

I went to the bridge party and after leaving it returned to Mr. Adair's office. I told him that I had been studying over the matter, and I didn't know what to do, and he said, "Well, there's only one thing to do, you'll simply have to go away." I said, "Mr. Adair, I have practically realized that I have to do anything that you all say, because I'm going to be ruined here, anyway, but, if I leave and no harm comes to Mr. Candler, I think that I should be assured a living. If you say that you are going to send me an amount each month, I have no assurance that it will be done, things might happen," and he said, "Well, we couldn't draw up papers to make it legal because we would expose the whole thing as to why Mr. Candler is paying you this annuity." "Well," I said, "then couldn't an amount, the interest on which would be sufficient to make this annuity, be deposited somewhere and let me draw the interest from that?" and Mr. Forrest Adair said, "That would be a good plan, George. We can get bonds, and she can clip the coupons." Now, I didn't know there was such a thing as clipping coupons on bonds, I've never had money enough to know that was done at all, and that was Mr. Forrest Adair's own suggestion. Mr. George Adair says, "No, Mrs. Hirsch has been to a bridge party this afternoon, which shows that she plays cards; she might take the amount and squander it or gamble it in some way and then come back on Mr. Candler," and I said, "Don't you know that if I leave here under the cloud that you are trying to get me to do, don't you know that I couldn't come back on Mr. Candler for anything and nobody would believe me if I did." So they agreed finally that that was all right; that I should be given an amount of money or bonds. They said that would make $250 a month, and Mr. Forrest Adair said, "Well, I'll say that we'll do that."

It was agreed that I shouldn't leave until after Mr. Hirsch had come home Friday evening and had left for Pittsburg on the following Sunday; they agreed that while he was as far away as Pittsburg would be a good time for me to leave because it would give me time to get far enough away. So I left the office promising to call them up as soon as Mr. Hirsch left.

Mr. Erwin's testimony is true. I thought he might help me as I knew nothing about investments. So is Mr. Young's. I was afraid that some one might steal the bonds I expected to get. Mr. Hirsch came home late Friday night. On Sunday I saw him off on the Pittsburg train and then called up Mr. Adair and told him he had gone. Next morning at 9:30 I was at his office; Asa Candler, Jr., was in there, and I began to cry right away. I said that it seemed that I was being subjected to a great deal of embarrassment, that I didn't want to talk about this to so many people. He said, "Well, it's very necessary that Asa Candler should be here to complete our arrangements, for," he said, "I have led you to believe falsely yesterday, when I told you Mr. Cook had softened,

because evidently he hasn't," and he said, "you are going to have to go."

When I told Forrest Adair about my trip to the station with my husband he took my hand and kissed it and tears came into his eyes and he said, "Little woman, my heart goes out to you; when I came into this I came in as a friend of Mr. Candler, but I'm your friend now, too," and he said, "I'm so sorry for you, and my brother, George, is just as sorry for you as I am," and said, "we are both your friends, too." Then I told him about having fixed some shirts for Mr. Hirsch that week, that I had made for him some time before that—I said "I just feel I can't leave until even his clothes are in good repair, because I have always taken care of him so good." Mr. Asa, Jr., said, "Well, it's a shame that a woman who is domestically inclined can't live with her husband, that that brute has to make her leave him." They said, "Now, we are prepared to meet your demands as to an annuity, or as to this amount that will give you an income of $250 a month and it will be better just for you to leave a letter for your husband telling him either that you have been untrue to him, or something like that, in a way that he will never want to look you up."

I said in one of the first visits that I had made to Mr. Adair's office he had suggested that they give me money enough to go and establish myself somewhere else. This was before the question of the bonds came up, when we were speaking of an annuity, he said "I would suggest that we not only give Mrs. Hirsch this annuity, but that we give her money enough to establish herself in a good way wherever she is going—pay her expenses and any little expenses she has here before she went."

On this last visit I told him that I had mentioned, or was talking to Mr. Hirsch about money matters when he was home before, and he had told me that he owed a note in the bank for $1,150, part of the money he had borrowed while I was ill in the hospital. I did not say that the money was all for my illness or anything like that; $1,300 was a note that he owed; $1,500 was mortgage on a bungalow he owned—I have forgotten the other matters, but I did note them down on the margin of a newspaper in the office of Mr. Adair. I said, "when I leave here I feel that I want to leave Mr. Hirsch an amount sufficient to square him up, for if anything will make him forget me, or in a way, turn him against me, it will be the fact that I have been able to give him that sum of money, for he will wonder where I got it," and I said, "If I leave that amount to his credit he will know what I have done without my writing and telling him. Part of these debts have been incurred for me and I feel it is nothing more than right that he should be given the money to liquidate all his debts, too, and if I can make my going easier for him in that way I would like to do it."

I told them that I had another plan that I had thought of that I would like to put to Mr. Candler himself. Mr. Asa, Jr., said, "My father is not a man of the world and I think you can talk to me and I could understand anything and I'm sure that I'd under-

stand just what you want to convey." "Well," I said, "well, I have tried to do charitable work here. I have visited the mill districts here, the different nurseries, visited through the Associated Charities and things of that kind, and I find that it takes a whole lot of money, if you want to do charitable work, that unless you do have money it takes bodily strength, and all the work I have done has been done by bodily strength, and I would have liked to ask Mr. Candler if he could help me to bring good out of bad, that if I wanted to give up the rest of my life as an atonement for what I have done I think he would be willing to furnish the means for me to do good the rest of my life." I said, "I would like for him to place an amount at my disposal that I could go to work on and I would make a report to him monthly of every cent that was spent and let him know exactly how I was using these funds and if he wants to make an atonement for what he has done the same as I will do, if I will give my life to the work, will he give the money for it? I could take the interest on the money that he would place at my disposal and could do more good than he could do with his million in the Emory University," and I said "if he will place that amount at my disposal so that I can have the interest at my disposal, I will make him this report every month showing where I spent every cent and show him that I am trying to make good come out of evil," and they said, "What amount do you think would be right?" and I said "if one million dollars was what he gave to Emory University, I could take half that amount and do twice the good." They immediately froze up and said nothing more to me at all, only that they would have to confer with Judge Candler and they would let me know what their decision was. That was on Tuesday.

On Thursday I went up to Mr. Hirsch's office. I called up Mr. Candler, Forrest Adair, George Adair and Asa, Jr., and everybody that I could think of that had any connection with this, to try to get some information as to what was expected of me. While I was sitting in there, two officers came to the door and came in, presenting me a warrant charging me with blackmail. Nothing was further from my thoughts than to have exposed Mr. Candler. I didn't want it exposed; I had begged them not to even tell each other those things because every person that they had told and brought into this thing was an embarrassment to me; I didn't want anybody else to know it. Mr. Hirsch was notified, I think, in several ways—by the newspaper and by some of his friends. He wired to get bail for me—bond—and get me out of that place of incarceration. I didn't accept it, because I didn't want to take it from Mr. Hirsch with him not knowing how it happened. I told my minister every incident that had occurred and all about it, and asked him to tell Mr. Hirsch for me when he got home, and to tell him before he saw me. He did so. Sunday morning about 11 o'clock Mr. Hirsch's nephew came to the Tower, called for me, I went down stairs and he said, "Aunt Margaret, do you want to see Uncle Herman?" and I said "It isn't a question of what I want, does he

want to see me?" He said, "No, he doesn't." He said "Aunt Margaret, do you think Uncle Herman ought to live with you now?" and I said, "No."

That afternoon I employed James R. Bedgood to represent me. They had brought Mr. Cook into my room at the Tower and had told me that this was a joint indictment of Mr. Cook and myself and that if I employed an attorney different from them it might be that they would clash in the two defenses, and that my case and Mr. Cook's case should be practically conducted along the same lines. So on Sunday afternoon I talked to them and told them that I would ask them to represent me, too. On Monday Mr. Hirsch came to the Tower to see me. He asked me if it was true that Forrest Adair and George Adair and Asa Candler, Jr., had tried to get me to leave him, and all during his absence from home; he asked if during the time that he was at home—

The COURT. I don't think she can go into that, and besides, all of these things occurred after the enterprise is ended.

Mr. Russell. I quite agree with Your Honor about that, but it might be leading to something else that she wishes to say.

The COURT. Mrs. Hirsch, anything you want to say in regard to the case is proper. If she wants to make any other statement about the case itself she may do it, but I don't think she can go into what occurred between herself and her husband. I don't think that's any part of the case. Now, Mrs. Hirsch, anything you want to say about your case that you haven't stated to the jury you can do so.

Mrs. Hirsch. Well, there was another matter in my mind, but the interruption has taken it from my mind.

The COURT. If you are through madam, you may stop.

Mrs. Hirsch. I had thought about it, but it went from my mind on account of the interruption.

The COURT. Well, if it comes back to you during the trial, I will let you come back and make a further statement.

IN REBUTTAL.

J. D. Basemore. Am deputy sheriff at the Tower.

Mr. Arnold. Did Attorney J. R. Bedgood make any attempts to see Mrs. Humphries at the jail? Yes, but she refused to see him, saying that he was not her lawyer. Did you receive information to the effect that Mrs. Humphries knew anything about this case? Yes; John Thompson, a white prisoner held on a murder charge, stated that Mrs. Humphries knew all about it. What did you do then? I sent for Mrs. Humphries while Mrs. Hirsch was in conference with Cook and Attorney Bedgood. Mrs. Humphries said that Mrs. Hirsch had told her that the entire matter was a frame-up on Mr. Candler between Mr. Hirsch, Cook and herself. No inducement, money or otherwise, or threats had been made to secure this statement. I told Mr. Steph-

ens, assistant solicitor, about my conversation with Mrs. Humphries.

Cross-examined. The Humphries woman had been placed in jail two days after Mrs. Hirsch; she gave no reason for Mrs. Hirsch's alleged confession. I have no interest in the case save as an officer of the State.

Fred Smith, deputy jailer, testified to the same effect.

Forrest Adair (recalled). My brother and I did not tell Cook that I suspected a plot to blackmail Mayor Candler, as Cook testified. I did not suggest to Mrs. Hirsch that she leave her husband; that she be paid an annuity; I did not tell Cook I believed Mrs. Hirsch's story.

Asa G. Candler, Jr. On the afternoon of February 6 my father came into my office and asked me to come upstairs with him. Upon arriving at his office the door into the hall was open and Mrs. Hirsch was standing at the end of the table, crying, and appeared to be waiting; after asking my father who I was Mrs. Hirsch laughed; was present at a conversation with Mrs. Hirsch and Forrest Adair in the latter's office at a later date. I made no promise or agreement to pay any sum of money while at this conference or mentioning any sum whatsoever. Mrs. Hirsch mentioned the sum of $500,000, and also an amount sufficient to pay her husband's debts.

Mr. Russell. What were you doing in Adair's office? Representing my father. Were you trying to take care of him? Yes, sir. Did you feel kindly towards Mrs. Hirsch? I had no feeling whatever toward her. I was present at the conference in Mr. Adair's office for the purpose of finding out what demands Mrs. Hirsch intended to make on my father. I held no feelings in regard to Mrs. Hirsch at that time. I do now; my reason for this change is that while I then suspected blackmail, the defendant has since charged my father with the crime of adultery.

Mr. Russell. Have you ever heard of your father being charged with adultery before? No, sir. Did Mrs. Hirsch make the flat demand of $500,000? Yes, after a long conversation. What led up to this $500,000 demand you speak of? I don't know what happened at previous conferences. Do you remember anything that was said at that conference? Mr. Adair finally told Mrs. Hirsch to come to the point, and she said: "I must have $500,000." Both me and father used the stairway and not the elevator in going from one office to another; but father appeared to be excited and I do not remember what position the shades on the windows were in; the time was about 4:15 in the afternoon.

William Candler. Am the youngest son of Mr. Candler, Sr.; first met Mrs. Hirsch in the summer of 1917 at a regular weekly meeting of the Georgia State Automobile Association at the Ansley Hotel. It was during the automobile races at the Southeastern Fair and a photograph was taken outside the hotel in which I and Mrs. Hirsch both appeared. I gave Mrs. Hirsch my hand to help her step

up on the running board of an automobile and she continued to hold my hand during the taking of the picture; I held my hand behind my back as I did not want this to appear. While still holding my hand Mrs. Hirsch whispered to me: Look out, you'll touch the button directly. I had met Mrs. Hirsch and Cook at the automobile races and Mrs. Hirsch had asked me to show her the way to the ladies' rest room at the fair ground; I took her towards the rest room, but seeing Cook following us, left her.

Mr. Arnold. Did Mrs. Hirsch ever telephone to you and ask you to come to see her? Yes, three times. Did you ever go? No. When was this that she phoned you? Just before she went to the hospital in 1917 and also after she got back from the hospital. Are you married? Yes.

Mr. Russell. Did not Mrs. Hirsch want to see you on these occasions with reference to the sale of tickets for her automobile raffle. No, she merely asked me to come and see her. You bought some tickets, though? Yes, I bought $25 worth. Would you swear that this woman was tempting you? I thought she was. You're a modern Joseph, aren't you? No, sir. You have no part in the prosecution? No, sir. Did you ever tell your father, mother or pastor about this temptation? It was no temptation to me.

Edward A. Stephens. Am assistant solicitor; was requested to see Mrs. Rosa Belle Humphries at the jail and hear a statement from her; saw her in the woman's ward on the third floor; Dr. Altman, the county physician, was with her, as she was sick, and we had a short, general conversation; Mrs. Humphries at first declined to talk about the Hirsch case and said that she was sore on everybody in Atlanta. We later discused the matter, however, and she asked Dr. Altman if she should betray a confidence. Dr. Altman told her that under the circumstances she ought to answer, and she then stated that Mr. and Mrs. Hirsch and Cook had framed-up the whole thing on Mr. Candler and that Mrs. Hirsch had told her all the details. She refused, however, to give these details, and said that she was already in jail and they could do nothing worse to her if she did not divulge them. She referred, however, to a cafe in a basement near the court house, and I said to her: "I see you know something about it." I went back the next morning and made a further effort, when she again told me there was not a detail she was not thoroughly familiar with, as Mrs. Hirsch had told her all. She said that Mrs. Hirsch suspected her as a spy when they were first put in the same room together, but later grew friendly and would get in the same bed with her in the early morning, and it was then that the alleged confessions were made.

Cross-examined. My first information about Mrs. Humphries' supposed knowledge was given over the telephone, either on the day of the Cook trial or the day preceding; I reported the matter to the solicitor.

THE SPEECHES TO THE JURY.

MR. ARNOLD FOR THE STATE.

Mr. Arnold. Gentlemen, in the brief space at my disposal, I could not possibly discuss all of the facts in this case. It has taken over a day and half for the hearing of the witnesses and it is therefore only possible for me to touch the high points. I hope to get all the high points in the testimony before my time expires. Every case is controlled by a few main features in the evidence. These features it is impossible to get around. Gentlemen, this is a really hard case to argue because the facts are so clear.

Gentlemen of the jury, I hate to think that the day can ever come when there shall be one law for the rich and one for the poor in the State of Georgia. Before the law all persons are alike, and because a man is wealthy cannot prejudice the minds of honest men against him. We all have a chance to become rich, it depends entirely upon ourselves. When by our industry and business application we gather what we regard as riches, it must not be said that we are unprotected from the attacks of envious and unscrupulous characters. We all want to become rich. This woman wanted to become rich at one lick. She set a huge figure for one immoral act.

The greatest enemy to good law, it has been said, is the man who says, "the defendant is a woman. She is guilty, but, because of her sex, let us turn her loose." Gentlemen, such arguments trample justice under foot. You said that you were impartial in your minds in this case when you answered the *voir dire,* not merely that you were impartial except where there was a woman in the case. God pity that man, that snuffling, sniffling, spineless creature that loses his head over a woman's tears.

I do not want to be hard on anybody. The verdict in this case cannot be hard. The law of Georgia classes the crime only as a misdemeanor. I think that it ought to be a felony, but

it is not classed as such. I do not ask you to punish this woman. The question of her sentence rests with the court and I do not desire her punishment. All I want is your disapproval of her actions.

There is nothing as good as a good woman, and nothing sinks as low or becomes as dangerous as a fallen woman. When a woman once falls from virtue, how deception follows in her wake! No matter how beautiful and charming she may be, who does she consort with! Creatures like J. W. Cook. This has been true at all times and is true today. The weak spot in our judicial system is possibly the inability of untrained men to resist the tears and acting of a smart woman. And Mrs. Hirsch is smart. She is a good actress, smart and bold. My opinion of this case has changed since she took the stand and made her statement. Before then I thought Cook was at least as much responsible for the plot as she. After her statement I am convinced that most of the blame of the partnership is hers. Cook is just a common every-day crook. He made only a weak denial to Forrest Adair's statement of what he had told him. And according to his own words he has committed every known crime, except murder.

And this is the man—the high-toned man—who was so hurt to even think of the Mayor's escapade which he says he saw. Cook admits that he has been caught twice with the wives of other men. And then he has a sudden conversion. He boasts of this lurid past, but was washed white as snow at the Billy Sunday meeting. But he fell quickly when Mrs. Hirsch and he worked out this scheme. I do not say anything against conversion; it is all good if they stay converted. But there are many wolves in sheep's clothing, and many merely pretend conversions. It is the camouflage of the situation. He worked out this scheme and starts by getting converted. Why, while the Billy Sunday meetings were on he asked Mr. Gordon for a letter to a wholesale whisky house in order to start a blind tiger business and then said

later that he had dropped the idea for a better money-making plan. And that is the companion Mrs. Hirsch chose.

But she says that Forrest Adair led her into all this. That is part of her game. One had to pretend to be caught and one had to be the catcher. In some senses this plot is slick, but in others it is a terrible botch and does not do credit to Mrs. Hirsch's brain, but sometimes the size of the money involved clouds the brain. She was determined to get at Candler. She tried to get William three times. I hate to talk to good men of these things in the presence of good men and women, but I have got to because it is here. Did ever a good woman fall so easily as she says she did for Mr. Candler? Why, according to her own statement she phoned Mr. Candler and went to see him even after she says he made advances and demonstrations to her, and she kept on coming. What would become of the world were all women like that woman? Childless—running with Cook—calling on men twice her age —yet she says she had a good and confiding husband. If doings like that are allowed in Georgia I am ashamed of living in it. It is common for men to brag of their relations with women, but I never heard of a woman doing this before.

Why, if you believe Candler was guilty of the charge this woman makes, still if they plotted to extort money that is blackmail. But I don't have the remotest idea that Mr. Candler ever touched her save to shanke hands. There are some who will believe anything about a prominent man. Mr. Candler knew this when he brought these people into court, but he braved it all and deserves the thanks of the nation, as hundreds of men—plenty of them innocent—yield to blackmailers rather than face publicity. You may say what you please about Mr. Candler, but it doesn't move him one hair's breadth.

I want to give you some reasons why this charge against Mr. Candler is unreasonable, although it makes no difference in law whether the charge is true or not. I cannot cast half as bad a statement on Mrs. Hirsch as she has cast upon herself. In the days of the ancient Hebrews under their law

a married woman guilty of the crime of adultery was stoned to death. That penalty was too severe, but ours is too mild.

You see sitting before you a very dangerous woman. As an actress she has got Sarah Bernhardt skinned. The emptying of the court room for her statement and her tears are all acted, what difference does it make when it is all going to be made public on the records. She laughed and cried at will. I would love to try her before a jury of good women. There would be no crying then; only weak men are affected by this.

There are too many coincidences in this case. What a marvelous coincidence that Cook came out of the Grant building when he did. That she "happened" to come out of the Grant building shortly before. That Cook "happened" to hear the two fateful words "Wednesday afternoon" and no more of the conversation. Then something happened to frighten her while she was in Mr. Candler's office on February 6; that Cook happened to come into the office. The truth is Cook was mad. He was infatuated with her. He wrote a note to his "dear friend," Hirsch, whom he had only met twice alone, on street corners each time and he couldn't even remember the conversation at those meetings. He loved his friend, Hirsch, so much, yet he called his friend's wife Peg. Hirsch has a mighty poor way of showing his friendship for his friend Cook, I must say. He never even attended Handsome Bill's trial.

I am glad Hirsch didn't get that note. Mrs. Hirsch was right on the spot and she phoned Mr. Candler. You know, in some senses this plot was tolerably slick, but in some it was a rotten bungle. They didn't expect Mr. Candler would ever have grit enough to come to court. They thought all they would have to do for the rest of their lives would be to clip coupons.

William Candler is young and they planned to work a blackmail scheme on him at the ladies' rest room at the Fair. They would have had to work quickly, but then he is young. They allowed more time for an older man. William saw

Cook and it scared him. I don't believe he would have yielded to this woman's importunities, but if he had they would have pulled the blackmail stunt then.

Let me detail some of the few things in the case which speak louder than others: First, there were Mr. Candler's employes in the adjoining office with an unlocked door between the two rooms. Then Cook saw through the letter box without encountering any obstruction. There were two windows on Pryor street with the blinds up and a hotel across the street. No man performs the immoral act in a public place. You know it. Then she says she saw the man at the window while she was on the settee with Mr. Candler and immediately jumped up and ran to the door. Mr. Candler has too much at stake to run risks of detection like that. He would have taken more care, and besides, he would have selected a younger woman. I don't mean to cast reflections on Mrs. Hirsch's look. But she is 38, just out of the hospital and looking in bad health. She doesn't look healthy even now.

Will you fail to vindicate a man who has lived among you for a lifetime? A man 66 years old who has given $1,000,000 to bring a great institution of learning here? A man honored by the highest gift in the power of his fellow citizens, that of Mayor of this city? A man who has walked among you, honored and respected ever since 1873? He has helped every interest of credit in the town and is generous to a fault. He has given employment where it is wanted badly. Isn't his record worth considering? If Mr. Candler's record and reputation is worth nothing in this case, I would feel that I had lived in vain. It was perfectly natural under the circumstances for Mr. Candler to go to his son. He had a right to be suspicious of such actions. There are two things necessary to the crime of blackmail. First is the fact that the blackmailers have got to charge their victim with a crime. Adultery is a crime, blackmail is just a misdemeanor. Secondly, was the charge made with the intent to get money? The law encourages a man not to pay blackmail. The crime

is old in Europe and the east. It is new in Georgia, because we have not had many rich people. After this prosecution blackmailers in this part of the world will roost lower.

I doubt if Mrs. Hirsch would have admitted the figures about her husband's debts if her notations on the margin of The Constitution had not been kept. She wanted half a million for herself and $5,000 for him! Think of the way that husband has been treated. How would any man feel in like circumstances? He must have the patience of Job.

Mrs. Hirsch is a dangerous woman. She is liable to get a dozen men killed. If Candler had been hot-headed he might have shot Cook or Cook might have shot him, if he had resisted Cook's entrance. Or Mr. Hirsch might have gone gunning for someone if he had learned of the affair. A woman like this can cause more tragedies than anything I can think of.

We all want to look at the facts. Southerners are never going to hurt a woman unjustly. We put her on a pedestal because we expect much of her. But we do not if we know she is running around to offices for immoral purposes. No good woman loses her virtue so easily at 38 years of age. According to her own statement she only had to be asked.

From Thursday to Monday Mrs. Hirsch raised her demand from $3,000 a year to a lump sum of $500,000. Don't you know that Cook and she were together in that time? They were pleased with their success. Didn't expect it to be so easy. Cook probably said, "Don't be a piker; put it up to half a million." That's the gambler's game, all bluff, and Cook is a gambler through and through. Mr. Hirsch is a high-class man in a high-class position, and I don't believe what she told the Humphries woman about his complicity in the affair was true. I am going to ask the court to charge you that the blackmail charge is true, even if Mrs. Hirsch was caught in the act.

Mrs. Hirsch, when she believed they would take care of her, decided to get all she could. She and Cook got together and Cook says, "Where do I come in?" It was their inten-

tion after she had left town that Cook should join her and, my! what a time they would have had on that money! So, when she thought that Mr. Candler was going to provide for her, Cook says, "Raise your figures." She did, all right. She lived with her husband from Friday until Sunday after all this had happened, yet carried in her bosom all the time the purpose to wreck and ruin him, desert him and destroy all worth while in life for him for money.

I have full sympathy for anyone if there is any room for sympathy. I feel sorry for all men in the penitentiary and for those going to be hung, but we cannot tear down the law. If we do we become like Russia today, helpless because we have thrown law overboard, a giant at the mercy of Germany.

Mrs. Hirsch's statement was a better speech than all the lawyers could make put together. We are not in her class as speakers. Two hours, without a note. It was a wonderful mental feat and it is a pity that she can't put her talent to better use than she has done in this case. If I were in Hirsch's position I would do exactly as he would—"Fold my tent like the Arabs and silently steal away." I am sorry for Hirsch, for the man she has ruined and disgraced and made a laughing stock of before his friends.

I don't care if the judge puts her on probation like the Humphries woman, but I do want the jury to find the true verdict and not to sanction the defendant's crime in order to stamp this monster of blackmail for the sake of ourselves, our wives, and the future of our race.

Let us hold high the standard of our womanhood and let other cities say that Atlanta has the brave and proper idea for handling such cases.

I don't care a rap what her two able lawyers will say. Solicitor Boykin can answer them. I am relying on you. I know man's weakness when woman is tried, but some of the greatest criminals of history have been women. Lucretia Borga was the most famous of murderers. Mrs. Guinness, of Indiana, murdered scores and it was a queen who insti-

gated the massacres of St. Bartholemew's Eve. Some of the most cruel criminals have been women.

When some women begin to lead a life of shame they begin to prevaricate. They will not tell on each other. Mrs. Humphries would not tell on Mrs. Hirsch. There is a code of ethics among them.

I have discussed this case as best I could. You are the final arbiters. The law has fullest confidence in you and expects you to observe your oath to try men and women alike. Put it on record that you cannot approve of acts such as those of Mrs. Hirsch, the defendant.

MR. COOPER, FOR THE PRISONER.

Mr. Cooper. You have just heard what is perhaps the most remarkable speech in a court house in Georgia. I have never heard such a speech against a poor woman fall from the lips of mortal man in twenty-seven years' experience. If this case is going to be tried on oratory we will lose. No man can compete in that respect with Brother Arnold. During the trial of Cook, Mr. Arnold said that the woman was insane. He seems to have changed his idea. (*Mr. Arnold* here interrupted with an objection on the ground that no reference could be properly made to anything which had occurred at any other trial unless it had been introduced in evidence in the present case. The objection was sustained.)

He says in this trial that the defendant has even got Sarah Bernhart skinned. I have never heard a woman abused so in my life. I am sick and tired of this abuse of witnesses and prisoners in the courts of Georgia and pray for the day when we will be able to bring it to an end.

This is perhaps the most important misdemeanor case ever tried in Georgia. I have never seen such interest in a misdemeanor case before. You, gentlemen, are asked in this important trial to decide whether or not a defenseless woman can get justice or whether a man powerful in the community with great character, reputation and millions of dollars can win against her. I ask you to rise above the influence around the prosecutor's table. If the real truth had been

known on February 6 or after Mrs. H. H. Hirsch never would have been arrested. If the prosecutor had been an ordinary average citizen the trial would have taken its turn with other misdemeanor cases, but on account of the fact that Mr. Candler is the Mayor of the city and a multi-millionaire the defendant is indicted at special session of the grand jury. I don't care how he stands, financially or politically, the defendant still has some rights in a court house before a jury. She has the right to an unprejudiced trial.

No case has been made against the defendant under the law. If a trap was set for her by Forrest Adair, as he stated on the witness stand himself, he should go to the chain gang also if she goes, as an accomplice. I want to know why they were trying to settle the case with Mrs. Hirsch through Forrest Adair's agency, if Mr. Candler was not guilty of improper relations with her? Why did he employ the shrewdest lawyer in Atlanta, many detectives and the great blackmail expert, Forrest Adair, if there was not something to it?

I am surprised that you, Mr. Arnold, would so abuse and abase a woman, it will stick no feather in your crown. I wouldn't make a speech like that for all the money in the world, because some day I have got to die and face my judgment. I have got to face Him who when on earth said, "Let him who is without fault among you cast the first stone." I am no saint myself, I am a poor sinner and would plead guilty before the bar of God, but I would not try to crush the character of a poor woman as you have done.

I know Mr. Candler thinks more of a dollar than anything else in the world. Who is hurt and injured in this case? Not Candler, but the defendant at the bar. Not a dollar of money has parted from Candler nor has she demanded anything of him. Mr. Candler himself swore that the defendant had not made any demand of him for money and when he said this he knocked the state's case to the ground. Forrest Adair is the whole case for the prosecution and he is as guilty as the defendant in leading her and making the first suggestion of money to her. Candler knew he

was guilty and didn't want to talk to her so he brought Forrest Adair into the case. If I had done such a thing in my own office I'd have given her money. Mr. Candler admits enough in his own testimony to warrant him in paying her and he ought to pay for it.

I hope you have enough manhood, gentlemen of the jury, to stand up for a poor woman against this paid prosecuting attorney. Arnold has been having his own way so long up in this section that he's got bigheaded and I hope you will stop him by turning her loose.

Who brought the whole thing into court? Candler admits it. Mrs. Hirsch is the sufferer no matter what the result may be. Her character is blasted and she has lost all her friends—the best people in Atlanta. I can picture her saying that last good-by to her dear husband as a husband at the depot on that Sunday. Both of them are filled with pity at the sight of a soldier husband bidding farewell to his weeping wife and refer to their own perfect content and happiness. Yet Arnold says she is a mean woman—he has a heart of stone.

Candler, the prosecutor, is done as soon as the trap is laid and she falls in—then they close the books. They would have no case whatever if you wipe out Brother George and Forrest Adair. They made the case by offering her money. Why? Because Candler was caught in the act. But why should they ruin this poor woman? To save the reputation and good name of Asa Candler, Sr., she had to be gotten out of town. Something had happened in Mr. Candler's private office and something had to be done to save the great Mr. Candler. This is one case where the great detective, Adair, fell down. He told the woman he was her friend and says she cried like a child. Don't make the mistake again, Mr. Adair, of trying to put a poor woman in the chain gang. Millions don't count, life is only short, and we will follow the Good Book. Change your ways or you are lost, brother.

We will try this case not only by the law of Georgia, but by the divine law in the Bible. I know the Book from cover

to cover, and not even Bishop Candler, who has been sitting here so long, knows it better. I am no saint, but a sinner, but there is more rejoicing in heaven over one sinner that is saved than over ninety and nine that went out astray.

Arnold is not a gentle man. He says that he is bigger than all the lawyers and the legislators of Georgia because he criticizes them when they make blackmail a misdemeanor and says it ought to be a felony. That man has got so much sense that he is dangerous. I wonder all the hair doesn't come off his head. The great lawyer hears the dollars rattling in the pocket of the prosecutor. He is not representing the State of Georgia, he is representing money. I have a great respect for Solicitor Boykin; he is a mild mannered man and a nice man. Arnold, like myself, has never been honored by any office in the gift of the people. He must change his ways if he ever wants to get to Congress or on the bench.

I believe that the vindication of the defendant, of Mrs. Hirsch, is near at hand. I believe you are going to turn the scales in her favor and end her suffering. God knows she has suffered untold misery. Mrs. Hirsch had the court house cleared on her own motion when she made her statement. It was not on the advice of attorneys and it is to her eternal credit that she didn't want the public to hear what she had to say. She made the best statement that ever fell from the lips of a prisoner charged with crime. It brought tears to the eyes of all in the court room except Mr. Arnold. She made a statement no lawyer could have prepared. The only preparation which could render such a statement possible was that every word was the truth. It would be impossible for any man or woman to tell a lie for two hours without notes, with no contradiction. I was ready to close the case then, but we saw fit to put up evidence.

Let us end this thing here by a verdict of not guilty, for there is a court higher than the State, a court in Washington. There is nothing higher than that except the court of God, where all the truth will be known. Cook's testimony clears her and you ought to turn her loose on his evidence. No

reparation to Mrs. Hirsch can be made this side of the grave. Be kind, be charitable. Charity is the greatest word in the English language. We don't ask mercy. We ask justice, everlasting and eternal justice. Do unto her as you would have it done unto you under like circumstances.

You can't be merciful. The judge is the only man who can lawfully extend mercy in a court. We are asking a verdict of not guilty. Let us flash that verdict to the waiting world through these resourceful newspaper people. Save her character, save her from the chain gang and save her from humiliation. The judge will charge you correctly as to the points of law. He is a "wise man from the east." I ask you to save the woman; money will save Asa G. Candler.

MR. RUSSELL, FOR THE PRISONER.

Mr. Russell. Gentlemen of the jury, I know Mayor Candler and his record and all he has done for Atlanta and this section. I do not intend to appeal to you on any sentimental grounds. I do not envy the Mayor his money, I honor him for his sagacity in making it. I honor him for his record as a philanthropist and for all he has done. But I cannot condone his act when he brings a charge of blackmail on no just grounds against a lone woman who has confessedly broken the sweetest tie that binds man to woman and that Christ Himself makes the strongest of all earthly ties. There is no nobler and higher authority than the words of the Bible, that book which our mothers read and by which they held their sacred faith. Yet surely, Asa G. Candler cannot contend that he is a better man than He who was "a man after God's own heart." Yet David fell. He saw a beautiful woman bathing on the banks of the river. He sent for her and not only accomplished his purpose but also murdered her husband. Life is a strange thing. We none of us do more than look down the vista of years to the horizon of the grave, and nothing matters aside from the record we shall meet there.

The law as to blackmail, under which the defendant is in-

dicted, is found in Section 118 of the criminal code of the State. That section reads as follows:

"Sec. 118. Blackmail Defined. If any person shall, verbally, or by printing or writing, accuse another of a crime or offense, or expose or publish any of his or her personal or business acts, infirmities, failings, or compel any person to do any act, or to refrain from doing any lawful act, against his will, with intent to extort money or other thing of value from any person, or if any person shall attempt or threaten to do any of the acts above enumerated, with the intent to extort money or other thing of value, such person shall be guilty of blackmail, and shall be punished as for a misdemeanor."

The charge against this defendant cannot be proven by law in any court in this State on the evidence submitted. There never was any threat or demand, either to Candler or his agents. The only thing contemplated was when Cook stated on the stand that Candler had "beaten him to it" when he went to the grand jury a day ahead of the scheduled date for convening. The State has made absolutely no attempt to rebut this testimony, because they know they cannot do it.

I cannot agree with Mr. Arnold when he calls the man who is affected by a woman's tears a spineless, sniffling coward. I thank God that a woman's tears can move me. I would be ashamed to say to my wife, that woman whom I regard as the best of all women, that a woman's tears could not move me. But that's no reason why you should acquit the prisoner. The greatest actress who ever lived, gentlemen, cannot bring tears at will. They can simulate emotion, but no woman can make herself cry as Mrs. Hirsch cried, at will.

There was no accusation or demand made on Mr. Candler. No accusation of adultery until after the indictments had been found. Mr. Forrest Adair talked about getting her some money. He said to her in his office, immediately after the occurrence, "Candler told me all about it." He was the only one who introduced the question of money and he is entirely responsible for the woman's acceptance of his proposition. It doesn't matter whether there was an act of adultery or not. It is equally true whether there was or not that

blackmail was not committed either through accusation or demand. Candler admits she's been to his office a number of times. Have you any realization just how busy a man the Mayor of Atlanta, with all the huge business interests of Asa G. Candler is? Isn't it significant that she is given so much of his time for interviews in his office? You think that little point over when you get in the jury room. I haven't time to go more fully into it now.

Remember, if there is any reasonable doubt in your minds as to her guilt, you have got to turn her loose, if you are brave men and observe your oaths. Suspicion of her guilt is not enough. There must be no shadow of a doubt.

Suppose this thing had happened to me in my office and I was an innocent as Candler says he is? Would I have called my son, agents, lawyers, etc., if nothing had happened? Would any reasonable man? If nothing had happened in that office except what Mr. Candler says did happen, why all the excitement? Mr. Candler didn't say what he talked about during that seven minutes she was in his office, did he? He can't remember what it was about, except that "they talked about the Red Cross." It seems to me that if I talked for seven minutes about the Red Cross I could remember a little of what I said. What was all this excitement about? It looks mighty strange, this "tempest in a teapot," if nothing had happened. Then Mr. Candler tells his stenographer that he is expecting a woman at his office. He never suspects anything until she says there is a man at the window. Then he runs to get Forrest Adair.

And Rube Arnold comes in. You can bet there's a leg to be pulled. Oh, Forrest will mourn when he goes to Candler's funeral; $100,000 a year he gets as fees from Candler, he says. And neither Forrest nor Rube work for nothing. Forrest Adair is the smartest man in Atlanta. I mean it. He knows what side his bread is buttered on. He admits he was looking out for Candler. Candler says, "See if you can't get her." So Forrest leads her into a trap. He swore he did it to develop a suspected scheme. See, he didn't say there was

a scheme. Only that he suspected one. If there had been one you may be sure he'd have done more than merely "suspect it." When she met Forrest Adair in his private office that poor woman stood no more chance than a straw in the river or a snowball in hell. She was compromised the minute she entered Adair's private office. Adair admits he is a man of the world and knows everything about women. He says he knows women "up one side and down the other." Then Adair says to her, "What do you want?" and thus he started the negotiations.

The poor woman had long admired Candler. She had taken clippings from the paper about him. I have no doubt that many a clipping about Candler's gift of a million dollars to Emory University has been taken from The Methodist Christian Advocate, in this State of Georgia. I know my wife has one.

Mrs. Hirsch didn't demand any money. Even if she is guilty of the charge of immorality she has a right to settle with him for the damages he has inflicted upon her. In the indictment the prosecution didn't attempt a separate and distinct form of the case. They charge blackmail and do not even lay their case upon a mere attempt.

That is a despicable argument that the counsel for the State, Mr. Arnold, brings forth when he says he is willing for the woman to go on probation. God save the person who is put on probation in this country. Look at that Humphries woman. Taken up by Officer Maddox, just because she is on probation. No reason for it and nothing against her. They are dodging the case when they try to say to you, "find her guilty and leave the question of mercy to the judge." We want your vindication and, as far as possible, reparation for what this poor woman has suffered.

The State has absolutely failed to make a case. God knows Mrs. Hirsch didn't want to expose the affair. As Adair says, she didn't demand any money.

I am surprised at Mr. Arnold jumping on Cook as a common crook. What did Cook say on the witness stand? He

said, "I knew you couldn't impeach me in Fulton County." There is the gauntlet that he flings down to the State. I knew you couldn't impeach me. Did they accept the challenge. No one was introduced to try to impeach him. It is cowardly to attack a man's character as Arnold did Cook's, when the challenge for impeachment has been made and they haven't attempted to accept it. Cook is a stranger to me, but give him fair play.

There is no conspiracy shown by the State. They say that Cook displayed an undue interest in Mrs. Hirsch after he had suspected her and Mayor Candler. Why undue? Didn't he have a right to find out the truth. He wouldn't want her to continue going with his mother and sister if what he suspected turned out correct, would he? But his motive might be jealousy, as they say. Or it might be curiosity. Man is so constituted, you know, that when there is that kind of a spectacle in view he will go two miles to see. Then Cook says that Lee and Smith saw the act, too, but that they cannot be found now. The lady who kept the rooming house where they lived says they have mysteriously disappeared, too. The two young lady clerks at their office say they have gone, no one knows where. Detective Starnes says he cannot find them, although he talked to Lee on a recent Sunday. In the name of God, why have they gone?

Gentlemen, if your mind wavers in arriving at your decision, it is your duty to acquit. Unless you are sure of the guilt of the defendant beyond a reasonable doubt you must find a verdict of not guilty. Then the testimony of this taxi driver, Bill Baldwin. They state that Cook asked him to secure for him a master key to the offices in the Candler building. What are they trying to prove, burglary? This piece of evidence, however, is one of those little things that either proves nothing or too much. If they wish to prove burglary it means nothing, but if their idea is to prove conspiracy it proves too much, because if there was conspiracy between Mrs. Hirsch and Cook he would by their own contention need no key to get in the office.

Gentlemen, you can't select as the State would have you do the evidence you wish to believe and that you wish to class as false. On one side in this case stands reputation, power and wealth. On the other side stands a poor, ruined woman. When the whole world is fighting for democracy, when the guns are roaring and the swords flashing, see that she has a fair trial. Before you convict, think how you would consider it if she were your own daughter. If it is true that she has fallen, don't you think she has had punishment enough for that offense? On the evidence submitted, you are obliged to have doubt as to her guilt, and remember, you cannot find her guilty unless you are sure beyond a reasonable doubt.

And then son William. Ever after, as he says, this designing woman had pursued him and he had nobly resisted in the summer of 1917 when he saw his father and her together in pictures in the newspapers and saw them in public together, he never warned his father. I suppose he gave her the benefit of the doubt. Gentlemen, you do likewise.

Asa Candler, Sr., has a magnificent reputation, and no one stands higher in their community. But if I were he I would be ashamed to admit that my character needs the bolster of the fallen pedestal, of a crushed and bleeding woman's heart. Gentlemen of the jury, can't you see the future of your own little one, and the possibilities of life as it stretches its vista towards a dim horizon?

"That mercy I to others show,
That mercy show to me."

THE SOLICITOR GENERAL, FOR THE STATE.

Mr. Boykin. First, Gentlemen of the jury, let us look into the situation of the parties involved. The evidence shows that for several months Cook spent a large part of his time soliciting the sale of tickets for the automobile raffle for Mrs. Hirsch. Why was he able to do this? Because he was a man without a job, without means of support. Then, when the

woman was in the hospital and the raffle was over, the necessity of being with her was past, yet day in and day out he visits the hospital and carries flowers and fruit. After she is out of the hospital, he spends much time with her at restaurants, dining and talking. They meet by appointment in a clandestine manner. They sneak into the restaurants, sometimes one first and sometimes the other, but always waiting until the other arrived. What does the testimony show? On at least one occasion Mrs. Hirsch waited for an hour until Cook arrived. The waiter solicited her order and she said, "I won't order until my friend comes in." And who is her friend? W. J. Cook. They talk in subdued tones upstairs in the balcony of the restaurant, where they are away from the regular customers and can confer in secret.

Cook's story about the real estate business he claims to be engaged in is all a bluff. He never worked in real estate. He admits he has not worked for Thrower, in the Grant building, at least for many years. But he starts his pot early and begins by hanging around Thrower's place. He makes it an evident habit to use the Thrower office as a headquarters or loafing place. Why? Because he knew it was Mr. Candler's duty as mayor to frequently visit the city hall, and he wanted to learn the ways of Mr. Candler and the hours at which he went to and from his office. He could see Mr. Candler's moves as he went daily to the city hall through the window of the Thrower office.

Then, does Mrs. Hirsch act the part of a woman trapped on that fateful day, on February 6? With all the crusading which has been going on in Atlanta against vice, until they even have to hire jitney busses to conduct the business, with Chief Beavers, the terror of prostitutes, in office, even a common street woman would not let a man come in the door and catch her in the act in an office with windows open to spectators in a hotel across the street.

Don't you know that the man at the window was a myth? The words, "I saw a man looking in the window" were a signal to Cook. Don't you know the whole story about these

mysterious eyewitnesses is a lie? Why don't they produce their witnesses? The reason is Cook just picked the names Lee and Smith. If there ever were such men they have considerably more brains than Cook, for he didn't get out of the way.

I do not wish to be harsh on a woman. A virtuous woman is the noblest work of God, but the mould of virtue has been lost in this case. A scheming woman with a man like Cook, hunting trouble for a 66-year-old man of the integrity and character of Asa G. Candler deserves no consideration. The very name Candler carries the highest honor of any name in the State of Georgia. The men of that family have done more for this State than any other, with few exceptions. They were stalwart bulwarks in the reconstruction days and since then have helped to build Atlanta. But slander loves a shining mark. As good fruit is picked by the buzzard and bird of prey so is a man like Candler picked as the victim of unscrupulous criminals.

Let me show you the wide ramifications of their scheme. First, they thought he would fall for the trick. They would get all the money they could in the deal and Mrs. Hirsch would leave the city temporarily. Shortly Bill Cook would be back in town. He would go to Mr. Candler and say, "Old man, we've got the goods on you. You paid her to leave her husband and if you don't come across with another million or so we'll bring suit for alienation of affections." Could Mr. Candler have refused their demands? Don't you see the deep laid scheme?

They would have had Mr. Candler and would have worked on him until he was stripped of all his possessions.

Mrs. Hirsch says that she had a good influence over Mr. Cook. His family courted her favor because she had such an influence on "Handsome Bill." Let us see.

Can you imagine a woman with better resources in the way of tears and the influence of a marvelous actress. Couldn't she have used her tears and influence on Cook to have him not tell her husband? Did she appeal to Adair as a good and

noble man of the world to go and see Bill Cook and persuade him and do what he could to keep him quiet?

No. Her game was to impress on Mr. Candler that Cook "has caught me red-handed, is going to tell my husband, and I've got to get out of town"—with plenty of cash!

You remember that she states that after Mr. Adair had considered giving her an annuity of $3,000 a year she went to a card party, and when she got back her figure was raised to $500,000. Don't you know that she met Bill Cook after that card party and he told her to boost the price?

Gentlemen, counsel for the defense argue mercy; they argue sympathy and cite the story in the Bible where Christ forgave a harlot. The woman Christ forgave hadn't sinned against any one save herself. She hadn't entered into a malicious plot with a man like Cook to get money by evil ways for their joint use and purposes. She was not a blackmailer, but only a woman who had sinned as a woman against herself alone.

Your duty, gentlemen, in this case is great as men, and tears and moans are nothing else but attempts to influence you from your plain duty.

Some of the greatest outrages ever perpetrated in this state have been the turning loose of women as guilty as hell. The record in this respect is a blot on the state.

Let the court settle the question of clemency. We are not asking that the defendant be placed on probation or anything else, but that you do your duty. Mercy but sanctions wrong when a jury returns a verdict that doesn't speak the truth.

You will have sanctioned blackmail if you bring in the wrong verdict.

All through this event in Mr. Candler's office Mrs. Hirsch was acting her part to fit. She had agreed to let Cook in, to cry there's a man at the window as a signal to Cook to be at the door so that she could let him in. She then goes to her husband's office and finds a note, and in less than ten minutes phones Mr. Candler. What for? Not to stop Cook with Mr.

Candler's influence and power. Not to ask him to support her in a denial which Cook would never dare to bring against their combined statements. No, she wanted to impress Candler that Handsome Bill was going to tell her husband. Candler wouldn't talk to her and so she unbosoms herself to Forrest Adair. She is perfectly frank and at once confesses the immoral act. Can you imagine any decent woman admitting her shame when there was no one in the world to deny her innocence but a hobo like Cook?

Wouldn't Mr. Candler have stood by her, whether they were guilty or not, and have crushed Cook? Did she give Mr. Candler an opportunity to defend her character? No.

She was led into the shambles by her lawyers in the defense of Cook. She had to defend a lie. She sits by and hears Cook's story without protest.

She never asked for help, protection nor aid, not even bond. She wanted to play the suffering martyr. She admits she could have gotten out of the Tower, but wished to appeal to sympathy, so she stays in. Any man would lie to protect the honor of a woman. Wouldn't Cook? If he had been half way a man he would have done so.

THE CHARGE TO THE JURY.

JUDGE HILL. Gentlemen of the jury: A true bill has been found against both Cook and Mrs. Hirsch by the Grand Jury, but the indictment is of no evidential value, being merely the method employed to bring to trial. One defendant has been tried and convicted, but the present jury has nothing to do with that trial or verdict, and must disregard it outside of those points introduced in evidence in this trial. They must disregard all other references to the first trial made by counsel of either side. They must disregard all references to other bad women, both of history and modern times. They must disregard all appeals of counsel not based on facts brought out by testimony.

Two sacred voices alone are allowed to enter the jury box—

the voices of law and fact, as determined by the evidence. Any juror who listens to any other voice dishonors his position, disgraces the state and destroys the purposes of trial by jury. The indictment charges Mrs. H. H. Hirsch and W. J. Cook with blackmail and of verbally accusing Asa G. Candler, Sr., of adultery with Mrs. Hirsch with intent to extort money. The second clause in the indictment charges them as guilty of verbal blackmail in that they did threaten to accuse Asa G. Candler, Sr., of adultery with Mrs. Hirsch with intent to extort money. The third count charges that W. J. Cook and Mrs. H. H. Hirsch on February 6, 1918, did verbally accuse and did threaten to accuse Asa G. Candler, Sr., with attempting to commit the crime of adultery and with the actual crime with said Mrs. H. H. Hirsch, and threatening to expose that crime unless that money was paid.

In substance these charges are simply blackmail. There are two ways to commit the crime of blackmail, either by direct accusation or by threats to charge with the crime.

Mrs. Hirsch is on trial alone. She has entered a plea of not guilty and the burden of proof of her guilt is upon the State to establish beyond a reasonable doubt.

In the first place, the proof of conspiracy, an agreement to violate the law between two or more persons devolves upon the State as the basis of their charge. Conspiracy is a subtle thing that cannot be seen as it exists in the mind and can only be determined by the conduct and declarations of the alleged conspirators.

If the jury believed such a conspiracy existed in this case and that this was part of the threat to expose, then, if the jury believed such conspiracy existed everything done and said by one principal is chargeable to the other and each is responsible for the other. If either one directly or indirectly threatens to accuse to get money and if the jury believes a conspiracy originated by them existed it is their duty to find Mrs. Hirsch guilty.

Mere suspicion is not sufficient for a verdict, there must be

evidence strong enough to exclude every other reasonable hypothesis.

It is immaterial whether the prosecutor was guilty of adultery or not. Even if the jury believe that the improper relations did take place, nevertheless if Mrs. Hirsch and Cook took advantage of that fact to extort money these two people conspired illegally and it is the duty of the jury to find her guilty.

If a man suspects that a crime is about to be perpetrated he has a right to use all legal means to expose the crime and protect himself. If the jury believe there was a conspiracy in this case Mr. Candler had a right to get Forrest Adair or any one else to assist him in exposing the crime. No express demand for money is necessary to render the defendant guilty of blackmail if their conduct was such as to impress Mr. Candler or Mr. Adair as being equal to a demand. The law says extort and not demand.

If there was no conspiracy to begin with and Cook caught Mrs. Hirsch in the act and subsequently charged Mr. Candler with the crime of adultery and Mrs. Hirsch submitted in the accusation and joined him in making the accusation and from then on acted with him, if any accusation was made, she is equally guilty. The defendants need not begin as conspirators if pending the completion of the crime they become conspirators. If you believe beyond a reasonable doubt that Mrs. Hirsch and Cook were engaged in a conspiracy to extort money from Mr. Candler it is your duty to bring a verdict of guilty.

It is my duty to charge the jury that law is made for the whole state; for white and black, old and young, man and woman, good and bad. That the law is no respector of persons; that if there was sufficient reason to withhold punishment from the guilty party provision had been made which would authorize application for reprieve or pardon in the proper department in the state capitol. That the jury must not move to conviction with the idea of subsequent pardon.

The fact that the defendant is a woman has nothing to do

with the case as far as her guilt or innocence was concerned. The jury must not allow the position of the prosecutor as mayor, his power or past record to influence them.

THE VERDICT AND SENTENCE.

The *Jury* retired and after an absence of 25 minutes, returned into Court with a verdict of *Guilty*.

Mr. Russell asked for a poll of the jury and the clerk called each man's name and he stood and was questioned as to whether that was his verdict, all twelve answering in the affirmative.

JUDGE HILL said he found it somewhat difficult to decide what to do. The apparent poor health, type and breeding of the prisoner precluded the possibility of placing her upon the public roads or at hard labor.

He would therefore sentence her to serve twelve months at Milledgeville at the state farm, and at the end of her prison term to pay a fine of $1,000.

THE TRIAL OF PEDRO GIBERT, BERNARDO DE SOTO, FRANCISCO RUIZ, NICOLA COSTA, ANTONIO FERRER, MANUEL BOYGA, DOMINGO DE GUZMAN, JUAN ANTONIO PORTANA, MANUEL CASTILLO, ANGEL GARCIA, JOSE VELAZQUEZ, AND JUAN MONTENEGRO,

FOR PIRACY, BOSTON, MASSACHUSETTS, 1834.

THE NARRATIVE.

In August, 1832, the American brig Mexican, which was owned by one of the leading merchants of Salem, Massachusetts, sailed from that place for Rio Janeiro, having on board a valuable cargo and over twenty thousand dollars in specie. About the same time, the ship Panda, with a Spanish captain and crew, set sail from Havana on a slaving expedition. They met in the South Atlantic. The Panda overhauled the Mexican, fired, when within gunshot, and the Mexican hove to. Then some of the crew of the Panda boarded the Mexican, took from her all the money they could find, fastened the officers and sailors of the Mexican below, and set fire to her.

The pirates had neglected to fasten the cabin skylight, so that the crew of the brig raised it, and when they saw that the slaver was at a sufficient distance, they put the fire out and returned home. The slaver proceeded to the coast of Africa, and while there the officers of the British man-of-war Curlew heard of the capture of the Mexican, and as the Panda answered the description of the vessel that captured her, its commander took all of her crew he could lay his hands on, carried them to England, then brought them to Salem, where

they were all jailed, and taken subsequently to Boston where all of them but one, who had committed suicide while in prison, were put on trial before a Federal Court, presided over by Mr. Justice Story, for piracy.

The evidence was pretty conclusive as to their identity, but some of them—the cook, Ferrer; the cabin boy, Costa, and the three sailors: Guzman, Portana and Velazquez, the jury thought might have acted under the compulsion of the others, and so found them not guilty. But seven of the Spaniards, Gibert, the captain; De Soto, the mate, and Ruiz, Boyga, Castillo, Garcia and Montenegro, were convicted of piracy and sentenced to death. But the jury in returning their verdict recommended the mate De Soto to the merciful consideration of the Government "because of his generous, noble and self-sacrificing conduct in saving the lives of more than seventy human beings, the passengers and crew of the ship Minerva," an incident which was brought to their attention during the trial. And the wife of one of the counsel went to the President and told him the story of heroism, which so impressed the chief executive that he gave the mate a full pardon. As for the others, Boyga cut his throat and Ruiz pretended to be insane. But it was decided that he was shamming and with Boyga, sitting in a chair, the six pirates were hanged at the Leverett street jail in Boston.

THE TRIAL.[1]

In the United States Circuit Court, Boston, Massachusetts, November, 1834.

HON. JOSEPH STORY, [2]
HON. JOHN DAVIS, [3] } *Judges.*

Early in the month of June, 1834, intelligence reached this country, that the British brig of war Curlew, Capt. Trotter, while cruis-

[1] *Bibliography.* *"A Report of the Trial of Pedro Gibert, Bernardo De Soto, Francisco Ruiz, Nicola Costa, Antonio Ferrer, Manuel Boyga, Domingo De Guzman, Juan Antonio Portana, Manuel Castillo, Angel Garcia, Jose Velazquez, and Juan Montenegro alias Jose Basilio De Castro, before the United States Circuit Court, on

ing off the coast of Africa for slavers, had fallen in with, and captured, the Spanish schooner Panda, and that several of the crew of that vessel had been identified as the persons who robbed the brig Mexican, of Salem, on the 20th of September, 1832, while on her voyage from that port to Rio Janeiro. A part of the crew had been secured and taken to England, the remainder having escaped to the shore, where they were protected by the natives.

On the 26th of August, the British gun-brig Savage arrived in the harbor of Salem, having on board the following prisoners: *Pedro Gibert,* master mariner; *Bernardo de Soto, Francisco Ruiz, Nicola Costa, Antonio Ferrer, Manuel Boyga, Domingo de Guzman, Juan Antonio Portana, Manuel Castillo, Angel Garcia, Jose Valazquez,* and *Juan Montenegro,* otherwise called *Jose Basilio de Castro,* and *Juan Delgardo.* Delgardo committed suicide in Salem jail. Her commander, Lieutenant Loney, waited upon the authorities of

an Indictment Charging Them with the Commission of an Act of Piracy, on Board the Brig Mexican, of Salem; containing a full statement of the Testimony, and the Arguments of the Counsel on Both Sides, the Charge of the Court, Pronounced by the Hon. Judge Story, and the Verdict of the Jury, with an Appendix containing several Documents never before published. By a Congressional Stenographer. Boston: Russell, Odiorne & Metcalf. Providence: Marshall Brown & Co. Portland: Colman & Chisholm. Salem: John M. Ives. 1834."

[a]"A Full and Accurate Account—20 engravings. Trial of the Twelve Spanish Pirates of the Schooner Panda, a Guinea Slaver for Robbery and Piracy Committed on Board the Brig Mexican, 20th Sept., 1832. Boston: Published by Lemuel Gulliver, 82 State street. 1834."

On the title page is an engraving of the black King at Cape Lopez, who protected the crew of the Panda and A Pirate's Long Knife. The other illustrations are The Panda standing through the Bahama Channel; The Mate Begging His Life; Antonio Ferrer, the Tattooed Cook; The Panda at Anchor on the River Nazareth; Burying the Money on the Beach at Cape Lopez; The Pirates Concealed in the Woods Behind Cape Lopez; One of the Boxes of Dollars; Explosion of the Panda; A Kind of Knife Used by Slavers; Inhabitants of the Island of Fernando Po; Bernardo De Soto; Don Pedro Gibert; Ruiz leaving the Panda after Applying the Slow Match; Natives Carrying two of the Pirates up the River Nazareth; The Pirates Carrying Rum on Shore to Purchase Slaves; Antonio on the Top-gallant Mast; The Carpenter Applying the Match to the Bag of Powder in the Magazine; Blunt Chart of the Coast of Africa Showing the Haunts of the Pirates.

"Half a Century with Judges and Lawyers. By Joseph A. Willard. Boston and New York: Houghton-Mifflin & Company. The Riverside Press, Cambridge. 1896."

[a] See 1 Am. St. Tr. 44.

[a] See 1 Am. St. Tr. 44.

Salem, and after the usual formalities, surrendered his charge into their hands; stating that the English government waived their right to try and punish the prisoners, in favor of the United States, against whom the principal offense had been committed.

A primary examination was held in the Town Hall at Salem, Judge Davis, presiding; and the prisoners were directed to be transferred to the jail at Boston, there to await their trial at the October term of the United States Circuit Court. This was done, and on the 23d of October they were brought up at Boston, arraigned, furnished with copies, in Spanish and English, of the indictment found against them, and allowed three days to consider and determine upon their pleas. At the expiration of that time, they again appeared before the court, and severally pleaded not guilty. Their pleas were then recorded, and the 11th of November appointed as the day of trial.[4]

November 11.

The indictment charged that the prisoners on the High Seas, on the twentieth September, 1832, did piratically board a United States merchant brig, the Mexican, assault the captain, and carry off from the ship the sum of $20,000.

Andrew Dunlap,[5] United States District Attorney, for the Government.

D. L. Child[6] and *G. S. Hilliard,*[7] for the Prisoners.

[4] "The trial was at the old Masonic Temple, the building now occupied by R. H. Stearns & Co., on the corner of Tremont street and Temple place." Willard: "Half a Century with Judges and Lawyers."

[5] DUNLAP, ANDREW. (1794-1835.) Born Salem, Mass.; graduated Harvard, 1813; admitted to the Bar in Salem and removed to Boston, 1820; United States District Attorney, 1829-1835; author of "Fourth of July Orations" (1819, 1822); "Speech in Defense of Abner Kneeland" (1834); "Admiralty Practice in Civil Cases" (1836, 1850).

[6] CHILD, DAVID LEE. (1794-1874). Born West Boyleston, Mass.; graduated Harvard, 1817; sub-master Boston Latin School; Seretary of Legation, Lisbon, 1820; fought in Spain against the French; returned to America in 1824, studied law and was admitted to the Bar; went to Belgium to study the beet-sugar industry and introduced the manufacture of beet root sugar into the United States in 1836, for which he received a silver medal; editor "Massachusetts Journal," 1830; elected to Massachusetts Legislature and condemned annexation of Texas in a pamphlet entitled "Nabob's Vineyard," from which John Quincy Adams obtained many of the facts for his speeches in Congress on the Texan question; was an early member of the New England Anti-Slavery Society and wrote many letters and articles on slavery; edited with his wife the "Anti-

One hundred and fifty jurors were in attendance, under the venire previously issued.

Captain Gibert, and his mate Bernardo de Soto, through their

Slavery Standard" in New York (1843-1844). Died in Wayland, Mass.

[7] HILLIARD, GEORGE STILLMAN. (1808-1879). Born Machias, Me.; graduated Harvard, A. B. (1828), A. M. (1831), LL. B. (1832), LL. D. (1857), Trinity College; admitted to Boston Bar, 1833; joint editor with George Ripley of the "Christian Register," 1833; joint editor with Charles Sumner of the "Jurist"; editor of "Boston Courier," 1856-1861); State Senator and member of State Constitutional Convention, 1850; City Solicitor (Boston), 1854-1856; United States District Attorney (Mass.), 1866-1870; besides addresses, essays and reviews, he was the author of numerous publications. Died at Boston. Mr. Willard in his "Half a Century with Judges and Lawyers" (Boston: Houghton-Mifflin & Co. 1896), says: At No. 4 Court street, Boston, many distinguished lawyers had their offices. I copy here a slip which was pasted on the outer door: "In 1837, here were found Rufus Choate and F. B. Crowninshield (partners), Charles Sumner and George S. Hilliard (partners), Theophilus Parsons and William G. Stevens, Horace Mann, Edward G. Loring, Benjamin Guild, Luther S. Cushing, John O. Sargent, P. W. Chandler, John Codman, T. P. Chandler, John A. Andrew, and others." When Mr. George S. Hilliard left the building in 1856, he bade farewell to No. 4 in these graceful lines:

"The child that in the cradle slept,
When first upon the stairs I stepped,
Now strongly stalks across the land,
With beard on chin and vote in hand.

"And I have passed from summer's prime
To autumn's sober shadowy time,
And left the throbs and known the strife,
That slowly rear the dome of life.

"I hear no more the well-known feet,
The kindly looks no more I greet;
But ere I part from number four,
I leave my blessings at the door."

George S. Hilliard, who was the daintiest and most suave of men, was trying a case in which the opposing counsel sought to recover for services in exhibiting a panorama, when the following occurred: Mr. Hilliard: "How long a time does it take to unroll a panorama?" Witness (the owner): "That depends upon the audience." Hilliard: "What do you pay a man per night to turn the panorama?" Witness: "Ten dollars or fifteen dollars." Hilliard: "Seems to me that is pretty high; I think I should like to work for that." Witness: "Well, the next time I have a panorama I'll hire yer."

senior counsel, *Mr. Child*, availed themselves largely of their right to object to the jurors, as called by the clerk; challenging the full number (twenty) allowed by law. The following jurors were eventually selected, impanelled and sworn: Jeremiah Washburn, Charles Hudson, Leavitt Corbett, John Beals, Joseph Kelley, Anthony Kelley, Isaac Wise, Thacher R. Raymond, Charles Lawrence, William Knight, Peter Brigham and Jacob H. Bates.

Mr. Child addressed the Court in relation to a motion which he had formerly made respecting the log-book of the Panda (the alleged piratical schooner), and read an affidavit from the mate of the Panda and others, stating that the log-book was in the possession of certain parties in Portsmouth, England; that the manifestos of the cargo, etc., of the Panda were also at the Havanas and might be had by sending for them. He requested time in order that these necessary documents might be procured.

The COURT overruled the motion, on the ground that it could issue no process which would be effective in procuring the papers alluded to; it had no authority in Great Britain. On a former occasion, it had also been stated by an English officer, who would appear as a witness, and who was one of those who boarded the Panda, that the log-book of that vessel had never been discovered.

Mr. Child's motion to have the prisoners tried separately, was also overruled.

MR. DUNLAP'S OPENING.

Mr. Dunlap: Gentlemen of the jury. This is a solemn, and also an unusual scene. Here are twelve men, strangers to our country and to our language, indicted for a heinous offense, and now before you for life or death. They are indicted for a daring crime, and a flagrant violation of the laws, not only of this, but of every other civilized people. They are accused of piracy, which is an offense punishable by all nations, as well as by the particular government against which it has been committed. I shall first, gentlemen, give you an outline of the commission of the act with which the prisoners are charged, and then briefly state to you the law in relation to such act.

The brig Mexican, belonging to Salem, and owned by one of the most eminent merchants of that place, having on board a valuable cargo and twenty thousand dollars in specie, sailed from Salem for Rio Janeiro on the 29th of August, 1832, under the command of Capt. Butman. While quietly pursuing her voyage over the common pathway of nations, and having

arrived in 33 deg. N. lat. and 34, 30, W. lon. she fell in with a suspicious looking vessel from which she made many efforts, but unsuccessfully, to escape. This vessel, a schooner, having come up with the Mexican, fired a gun, and the captain of the latter, seeing that the schooner was armed with one long and two small guns, and that her decks were crowded with men, felt himself obliged to submit, and accordingly hove to. He was then hailed, and ordered to come on board the strange vessel, which mandate he obeyed in his own boat; but on reaching the schooner, five men jumped into the boat and ordered it to be rowed back to the brig. On arriving on board the brig, they directed the captain to accompany them into the cabin, where, brandishing their knives, threatening and beating him, they compelled him to acknowledge and give up the money which was in his possession. A communication was then made with their companions on board the schooner, who sent a launch and carried away the treasure. The party on board the Mexican then left, after confining the crew below, breaking the compasses, and destroying the rigging and tackle. They also set fire to the camboose, in which they placed a tub of combustibles, and lowered the mainsail in such a way that it would speedily ignite. A short time afterwards, however, the captain contrived to get upon deck, and extinguished the fire before it had caught the mainsail. They then repaired their damages as well as they were able, and returned to Salem, where they arrived on the 2nd of October. Information of what had taken place was immediately disseminated throughout this and other countries, and reached the coast of Africa, where Capt. Trotter, commanding the British brig of war Curlew, was then cruising. Circumstances led that gentleman to believe that the schooner Panda, then lying in the river Nazareth, was the vessel which had captured the Mexican. He immediately, therefore, proceeded to take measures against her. These measures resulted in the capture of the Panda, but the escape, for the time, of her crew. No ship's papers or log-book were found on board of her, although diligently sought for; and, owing

to some accident, she shortly afterwards blew up, thereby killing several of the Curlew's men. Capt. Trotter then sailed to other ports, still making efforts to discover the crew of the Panda, and at last succeeded in arresting the individuals now present.

One of these men, named Perez, had been received as State's evidence, and two other persons, Portuguese, who had served on board the Panda, but had not been concerned in the robbery of the Mexican, would also appear and give their testimony.

Mr. Dunlap paid a high compliment to the British government and navy, for the perseverance manifested in ferreting out the individuals concerned in this act of piracy, and for the feelings of courtesy and good will which had dictated the transfer of the prisoners to this country, instead of at once subjecting them, as might have been justly done, to trial and punishment in England. He then cited to the jury the law of the United States in relation to piracy.

THE WITNESSES FOR THE PROSECUTION.

Joseph Peabody. Am sole owner of the brig Mexican; shipped on board ten boxes, each containing $2000 when the brig sailed from Salem on 29th August, 1832; next time I saw her was forty-two days after; have frequently made the voyage from Salem to Havana; believe a vessel sailing from the former place, on 29th August, for Rio Janeiro, would meet another sailing on the 20th from the latter place, in lat. 33, lon. 34-30, where the piracy was committed.

Capt. John Groves Butman. Am master of the brig Mexican, of Salem; sailed from that port 29th August, 1832; had on board $20,000 in ten boxes, containing $2000 each. On the 20th of September, fell in, lat. 33, lon. 34½, with a schooner, about 4 in the morning—looked like a Baltimore clipper—had a low, long, straight hull—when it became quite light, found her on our weather quarter, standing from us; she then tacked and passed to windward of us—between 9 and 10 she was on our weather bow; about 10, tacked and endeavored to escape from her—did not like her looks—saw a man at the mast-head looking out—thought her a very suspicious looking vessel. About ten minutes after he set his square sail, and came directly down upon us—when within gun-shot he fired a gun to leeward—we then hove to. Firing a gun is the usual signal to heave to. Saw a great number of men on board, and

that he had two long guns; there was also something covered up amidships, can't say whether it was a gun or not—asked where we were from and whither we were bound—told him—he then asked what our cargo was—said it was saltpetre and tea. He then ordered me to come on board the schooner. The crew of the schooner were on deck at this time—I should think in number they amounted to about fifty or sixty men—lowered my boat, ordered four men into her, went in myself, and rowed towards the schooner—we steered for the gangway, but were directed to go towards the fore-chains. I did so, and held on by the chains, when five of the schooner's men jumped into the boat, and ordered me to row back to the brig. When we got on board the brig, they directed me to go into the cabin, which I did, and two or three of them followed. Two of them presented their knives to my breast, and demanded the money that was on board the vessel—was alarmed, and told them where it was. The pirates ordered the crew to get the money up immediately—beating them with the handles of their knives, because they did not work fast enough. The boxes containing the money were marked P, and were handed on deck as they were got up from the run. The knives used by the pirates were large. The men said I had more money, and went searching about—one of them said if they found more money, they would cut my throat—a short time afterwards, another came down, and insisted that I had more money—he had my speaking-tumpet in his hand, and beat me with it severely. A short time after, saw their boat going towards the schooner, with the boxes. In about fifteen minutes a boat full of them came back again—about twelve in all—heard them jump on deck, close the cabin doors and the after-hatchway—heard a great noise, as if the yards were coming down—smelled smoke shortly afterwards; then saw them, from the cabin window, go to their vessel—they had my boat and one of my spars with them. They hoisted in their own boat, and scuttled mine, as she filled with water immediately after they cast her off. The schooner then made sail from the brig; got up out of the cabin skylight, which they had neglected to fasten—found every thing in disorder, the rigging, yards, etc., flying about—all the running-rigging and halliards were cut away. The sails were also cut to pieces—the mainsail was hanging over the caboose, the roof of which was on fire—found a tub of tarred rope-yarns in the caboose—if we had not come upon deck at this moment, the caboose would have set the mainsail on fire, and then nothing could have saved the vessel; could not swear that any of the men now present were those who boarded the Mexican—saw and recognized a man who landed with these prisoners—saw him at the Town Hall, at Salem. The man to whom I allude recently committed suicide in jail. He was one of the two who drew their knives on me in the cabin.

Cross-examined. The schooner was about one hundred and fifty tons burden, of the Baltimore build. There are many of this sort of vessels engaged in the

Havana and African trade. The guns were of brass, think they were long twelve pounders.

Benjamin Brown Read. Am mate of the Mexican. At four A. M. came on deck, and was told of the circumstance by the second mate—when he told me this, I asked him if he could still see the vessel he spoke of—he said, No—I asked him for the glass, went with it on the forecastle and saw the schooner. She was then standing towards us—went below and called the captain—thought she might want to hail us—Captain came up and staid till daylight. The schooner was then coming up with us rapidly—we shortly saw her plainly—she appeared to be full of men—Capt. Butman at first thought they were not men, but the deadeyes of the lower rigging—went about our work as usual, not paying much attention to the schooner. At half past seven, however, finding that she lay a great deal nearer to the wind than we could, and that she sailed almost as fast again as we did, we began to notice her movements, and Capt. Butman said he should like to tack and try to get away from her—we did so, and stood to the west for half an hour; suspected the schooner from the number of men she had on board, and from her manoeuvres; told the captain I thought it would be of no use to attempt to hide the money, as all our crew knew that it was on board. While we were talking, the second mate came down, and said the schooner was chasing us. We went on deck, and the second mate said the schooner had just fired a gun; we saw the smoke, and she was just then setting her square-sail; consulted what was best to be done, and at last thought it best to heave to, knowing it would be of no use to attempt an escape. Capt. Butman ordered the colors to be hoisted and the main-topsail backed; saw the men very thick upon her forecastle, from which we were hailed. Saw knives under the sleeves of their jackets when they came on deck—they drew them—they were long, Spanish knives. One of them directed the captain to go down into the cabin, and followed him with two others. Captain had not been down long, before he called to me and told me to bring all hands aft. The three men then came up from the cabin, pointed their knives at us, and directed us to go down one at a time. When all the crew were in the cabin, the three men came down also, and told us to get up the money quickly—they struck us with their knives, because they thought we were not quick enough—we could not get the money up quicker, in consequence of being flustered and alarmed by their conduct. As fast as the boxes were brought up, they were carried up on deck. After they were all got up, one of the pirates hailed the schooner, and said there was plenty of money on board the brig, and also said something about the launch: immediately afterwards saw the launch coming from the schooner—the money was put in, and carried on board the schooner. They ransacked every place in the vessel, seeking for more money. The boatswain told me to go forward, kicked me into the forecastle, and placed a man to keep

me there. He came back, and asked me where my watch was, but before I had time to tell him, he had it out of my pocket; then asked me where my money was. It was hidden, but I told him I would bring it; he took the money, and told me to stay in the forecastle. I heard the boatswain asking the captain for his chronometer. Captain said he had none. Boatswain then caught up the speaking-trumpet, and gave the captain such a blow as broke it almost to pieces. He then ordered me on deck, and kicked me down again into the forecastle, and told me not to come up. Staid a few moments: he then called me up, took me aft, and pitched me into the cabin. The crew were all fastened below. Saw the pirates launching our yards into the water; heard the topsail yard coming down, and that they were cutting the rigging—they used an axe. Staid till all was quiet; saw the boat go to the schooner for the last time; saw them hoist our yards on board, and then make sail; then got out through the cabin skylight; found everything cut to pieces, and the boom going from side to side. The caboose was on fire, and in the inside found a barrel containing a quantity of tarred rope-yarn, and a pot of tar. If we had not got out when we did, the mainsail would have soon been on fire. Should not think the fire could have been extinguished. Have seen some of the men since. Two of them I am sure were on board our brig, and am confident respecting another one.

(Here the witness went up to and laid his hand upon Francisco Ruiz and Manuel Boyga. The interpreter translated to the prisoners what the witness had stated, and they both denied that they had ever been on board the Mexican.)

Do not see here the third person I had spoken of. Saw him at Salem, when the prisoners were examined there.

Cross-examined. Do not remember how Ruiz was dressed. He had on a jacket; cannot recollect what was the color, or what he had on his head—cannot call to mind the dress of Boyga. The schooner's guns were short guns. Among the men who came on board from the schooner was the boatswain; was about five feet in height, stout and wore large whiskers; had a bunch on his nose.

Nov. 12.

Benjamin Larcom. Was one of the crew of the Mexican when she was boarded by the pirates. Saw one of them at Salem some time ago.

(The witness here went up, placed his hand upon Ruiz the carpenter, and said, I believe this is the man.)

This man came to the brig in the first party from the schooner.

Cross-examined. Was in our boat when she went the first time to the schooner. Stayed where I was to bail the boat—heard a noise on deck—thought they were murdering the crew—drew the boat ahead of the brig, and hid myself there—did not see any of the pirates but the five who came in our boat. The boatswain of the schooner was among them—he might be from five feet four to five feet six inches high—was of a dark complexion—think he had straight hair—do not remem-

ber the shape of his nose—think he wore a blue jacket—he was a middle-sized man, not very stout. When I saw Ruiz at Salem, did not tell any one at the time that I recognized him. Think there might be about sixty men on board the schooner when we were boarded by them.

(The *Counsel for the prisoners* here called upon the witness to look the prisoner Ruiz in the face, and say upon his oath whether that was one of the men who came on board the Mexican. The witness said he could not swear to him.)

To the *District Attorney*. Recognize the prisoner Ruiz, the moment I saw him at Salem. Captain and mate only had given their testimony at Salem. No one had been examined before I saw them. Never spoke to any one in the street about him.

John Battis. Recognize in the court two of the pirates on board the Mexican. (Witness placed his hand on Ruiz and Boyga.) First saw Ruiz at the companion-way of the Mexican. Saw him next standing guard at the fore-castle.

Cross-examined. Was seventeen at the time the Mexican was boarded. Was the Captain's boy. Five men came on board from the schooner in our boat. Three men went below with the Captain in the cabin, and two remained on deck—these two were Ruiz and Boyga. Have not talked with the crew of the Mexican about these men in particular. First recognized them on board the Savage at Salem. Told a great many that I recognized them—cannot tell who in particular, there were so many. There were a great many I knew on board the Savage. Did not tell them that I knew these men in particular—merely said that I recognized some of them.

Was alarmed when the pirates began to abuse us, and when I saw their knives; was not much afraid before. Should think there were fifty men on board the schooner; believe she had a carved head, painted white—could not exactly say what it was. She was painted black with a white streak. Ruiz had on a tarpaulin hat; cannot say whether he had a jacket or not; he had on duck pantaloons and a checked shirt. Remember the boatswain—should think he was about five feet high. He had a straight nose, with a bunch on the right side of it; had no whiskers, and was not very stout.

Thomas Fuller. Was of the crew of the Mexican; I identify Ruiz. (Witness went up to him and struck him rather rudely upon the shoulder. Ruiz immediately started up, and protested indignantly and with much gesticulation against such conduct. He ought not, he said, to be thus treated in the tribunal. The rest of the prisoners also arose from their seats, and evinced much excitement. They were at last pacified by the interpreter, and the examination proceeded.)

Recollect Ruiz perfectly well. Saw him beat our steward with a batten. Went with our captain in the boat. Saw the pirates in our cabin and fore-peak—saw six or eight pirates on deck—Ruiz among them, and another with him, five feet two or three inches in height, dark complexion, long nose, had a crooked Roman nose; had on a white felt hat; had jacket, but don't know the color.

Think Ruiz had on a blue jacket and cap; when he came on board, told his comrades to get something. Pirates hailed us in good English; could understand them readily; language rather foreign accent. First saw the men on deck of Mexican; saw them afterwards in gaol. First recognized Ruiz the day he was brought up here; mentioned it to no person. Do not feel any resentment against Ruiz more than the rest.

Benjamin Daniels. Was one of the crew of the Mexican when she was boarded; have seen some of the pirates since; saw them in this courthouse yesterday. Saw them at a previous examination. (Witness here pointed out Ruiz.) Can't tell in what part of our vessel I saw him; saw him several times; am sure Ruiz is the man; he came on board in our boat with the first party.

Cross-examined. Feel sure that man was one of those who robbed the Mexican. Saw a man among them called the boatswain; can't recollect how he was dressed, except that he had a dark jacket. Do not know what sort of a nose the boatswain had. Boatswain had whiskers. Cannot tell what dress Ruiz wore, or whereabouts in the brig I saw him; he was driving us round the deck with the others. Two of the pirates remained on deck, and three remained below. Was much frightened and flustered; feel confident, nevertheless, that Ruiz was one of the men who boarded us. Am aware that his life depends on the result of this trial.

Thomas Charles Henry Ridgly (colored). Was cook on board the Mexican when she was robbed —think I have seen two of the men since who committed the robbery; was lying along some spars in such a position that I could see all who came on board—the pirates did not disturb me at first.

(Witness here pointed out the black cook of the Panda (Antonio Ferrer) and Manuel Boyga, as the individuals he recognized.)

Ferrer was on board the schooner, and Boyga came in the boat to the Mexican. (Ferrer) was on the top gallant yard of the schooner, which was sometimes very near to the Mexican—not further from her than the distance from one side of the court to the other. The schooner sometimes came so near the brig that I could see the tattooing on Ferrer's face.

John Lewis (colored). Was steward of the Mexican; have seen some of the pirates since the robbery.

(Witness here went up to Ruiz, the carpenter, and laid his hand upon his shoulder, and said, this is one of them.)

Ruiz beat me on the half deck with an oaken batten, because I would not show him where the money was.

Cross-examined. If I should see any of the others, don't think I should know them—probably might know the boatswain.

Joseph Perez. Was one of the crew of the Panda at the time the robbery was committed on board the Mexican. Have turned State's evidence. (Previously to being placed on the stand he was informed by the Court that if he told "the truth, the whole truth, and nothing but the truth," he would not himself be proceeded against; but that if he spoke in any respect falsely, he would for-

feit all claims to favor, and be considered in the same light as the prisoners at the bar. He was then sworn upon a Bible, authenticated by the Catholic bishop of this place, and permitted, through the medium of the interpreter, to commence his testimony.)

I was born at Marguerita, twenty-two years ago. Was last in the Havana, 2 years and 9 months since; shipped at that time on board the Panda, Capt. Gibert—Bernardo de Soto was mate, and the prisoners now present formed part of the crew —there were thirty men in all. Francisco Ruiz was carpenter of the schooner. When they passed the Moro Castle, in sailing from the harbor, they were hailed and asked what schooner, and where bound, etc. The reply was, "The Panda, to St. Thomas." This was 20th or 26th of August.

On the outward passage, we spoke first a carvette, and then the Mexican, on the 25th of September. It was the second mate's watch—the captain was asleep at the time, but got up and ordered the schooner to go about and stand for the brig as soon as it became more light was in the foretop. About 8 in the morning the American brig altered her course, and stood south as at first —the wind was moderate, and the sea smooth—the Panda then set her squaresail and steered for the brig—when they neared her, a sailor went forward and fired a musket—the brig then hove to, and hoisted the American flag—the schooner hoisted the Columbian flag—they sung out to the brig in English, and inquired where she came from, and where she was bound—the reply was, "from Boston into Rio Janeiro"—a sailor who spoke English hailed the brig—the boat of the brig came to the schooner with four men and one officer.

The third mate, the boatswain, the carpenter, and one sailor then jumped into her, and proceeded to the brig.

(Witness being asked if any of these four men were now in the court, upon which he pointed out Ruiz. The latter immediately started from his seat, shook his fist at Perez, and in loud and passionate tones, declared him a traitor, a liar and a rogue.)

The third mate ran away at Nazareth, the boatswain died at Fernando Po, and the sailor, named Manuel Delgardo, died in gaol at Boston. The third mate then took up the speaking-trumpet, and sung out to the Captain, "There is plenty of what you want, and what you are looking for; there are $20,000 on board, in ten boxes, by the ship's papers." The boatswain also held up a handful of dollars, which he afterwards threw into the sea. The captain said, "Very well, very well, let her be well searched, and bring it all on board."

They brought ten boxes of money from the brig—saw it with my own eyes, from the foretop—it was brought by the American boat, which was towed by that of the schooner—the boats then returned to the brig, and came off again shortly afterwards with two spars, a keg of butter and some fowls. They then went back again on board the brig, cut away the halyards and sails, and let the yards run down—one of the schooner's men also got up into the top and stabbed the belly of the maintopsail. I looked so much

at the brig that Captain Gibert was angry and sent another man into the maintop to keep a look-out with me. Shortly after saw a sail, and sung out to the captain, who asked her where she was—I said astern of the American brig, and so near that I could see her three masts. On the forecastle of the American brig, saw one of the schooner's men keeping guard, with a handspike in his hand. Captain sung out, "Take them out of the forecastle, and shut them up in the cabin." The third mate had a sword, the other men knives—they chased the brig's crew into the cabin, and shut them up under a padlock. Heard it said afterwards that a smoke was made to suffocate them. After the hatches were all shut, the schooner's men started from the brig for our own vessel, carried the brig's boat with them, and scuttled her. The boxes taken from the brig were marked with a letter—cannot say whether it was a P or a D. The schooner went to Prince's Island, from which she came shortly afterwards in great haste, and was run on shore at Cape Lopez, near the river Nazareth. Acted as the captain's servant, and when the captain arrived at Nazareth, I set the table for him in a room above stairs. There heard the captain and boatswain talking together. The former said he had been obliged to fly from Prince's Island in consequence of news of the American brig affair having reached that place. He had purchased $250 worth of provisions, but had come away without them. The captain came from Prince's Islands in February, and remained at Nazareth four months, at the expiration of which time the English came up the river in boats. As soon as they were seen, the carpenter (Ruiz), went into the cabin of the Panda, took up the after scuttle, and put a match to a keg or bag of gunpowder. The crew then went on shore, and the carpenter followed soon after in a canoe, taking with him the ship's papers. They all went to the barracks (huts where they kept the slaves). The English took the schooner off with them to sea, but returned in fifteen days, when the English commander came on shore and demanded of the African king that he should give up at least the captain and carpenter of the Panda, if none others of the crew. The king, however, refused, and the English then began to fire upon the town from the pivot gun of the Panda. This gun was a twelve or sixteen pounder (brass), and she had besides two small carronades. During the firing, the schooner took fire. The English went away in three days. After this, the money taken from the Mexican was hid in a barrel on the beach, on the right hand side—did not know, at the time, whether all the money was hidden, because an order came from the captain to go into the bush, for the English were coming in their boats—they afterwards took the money up and buried it again at Cape Lopez—they went for it again in a few days, by order of the captain—five of them went, all now present. I was one of the number. I and Castillo dug up the money and the others began to count it. I told them they had no time to count the money, to which they replied that they had the cap-

tain's orders to count out $5,000, and leave it there for him. We left the $5,000, and took away $6,000, which was all that remained. This sum was divided among us. We were told that the captain was going to divide it, and that if each man did not go and get his share there would be the devil to pay. I was not taken, but surrendered myself voluntarily at Fernando Po. The boatswain, four seamen and myself went to Fernando Po. Three of them are now in court, Delgardo cut his throat in this city, and the boatswain died—they were taken from Fernando Po, towards the Island of Ascension, where they found the rest of the prisoners. I and four more were taken to England in a schooner—the rest followed in the Curlew, and from England they were all brought to the United States, in His Majesty's brig-of-war Savage.

Nov. 13.

Perez, cross-examined. The Panda's cargo consisted of new rum, 30 bales of cloth, 250 muskets, 250 barrels of powder, knives, necklaces, cutlasses, flints, axes. I shipped for $20 per month as an ordinary. The seamen had $25; cannot read or write; do not know what course the Panda was steering when she fell in with the Mexican; do not understand navigation; pivot gun of the Panda was placed abaft the mainmast. After the crew of the brig was driven into the cabin, Guzman was sent to keep a look out in the maintop; I was in the foretop; the cook (Antonio Ferrer) was not sent to look out, but stayed in his galley. The Panda ran away from the sail seen just after robbing the Mexican. Lost sight of the ship about 4 in the afternoon. It was thought she was a ship of war. Saw the captain of the Panda take a pistol away from the third mate, which he had brought from the Mexican, and throw it overboard, saying he wanted no such a thing on board his vessel; only wanted money. Did not see the watch brought on board by the boatswain—heard he brought one, and a piece of duck. They took four oars out of the brig's boat, and then scuttled her with an axe. Those who went on board the American brig at first, were armed; the third mate with a sword, and the rest with long Spanish knives—the blades of these knives were ground very sharp like daggers. The Spanish sailors usually scoop out a little of the back part of the knife near the point, and then sharpen the point. It is customary to give the men jackknives, but they bring their own long knives in their bags.

(The witness here pointed out those of the prisoners who went on board the Mexican, who were now present in court, and said that the rest were dead.)

They were thirteen in all. As fast as they came from the schooner the captain sent others in their place. Capt. Gibert hailed the American brig, and ordered his men to take her crew from the forecastle and shut them up in the cabin. Castillo told me that a smoke was made to suffocate them. Did not see any fire. The boatswain had a scar on his nose; wound had been large, but was healed. Don't remember whether his nose was straight or crooked. It was not a negro's nose (pointing to Fer-

rer's), but a long nose. His hair was black and curly. If boatswain were alive, every one would know him by the cut across his nose. He was about the middle size; sometimes wore a straw hat, sometimes a cap; generally wore a light felt hat, with low round crown; never saw other felt hats on board the schooner. Don't know what shoes he wore at the time; sometimes wore yellow, and sometimes black shoes; crew wore shoes of both colors; yellow shoes are made of untanned skin; shoes sold for six and eight rials (equal to seventy-five cents and one dollar) in Havana. Don't remember what shoes Boyga wore; the officers wore black shoes; one or two of the men also had black shoes. Do not remember whether the boatswain wore a jacket or not, on the day of the robbery. He was a poor man, and could not afford to wear a jacket at sea. The sailors on board Guineamen seldom wear jackets, but take one with them, usually, in case they should go ashore at any port. Do not know what color the jackers were that the sailors wore, as I did not look particularly at their backs. Do not remember whether any of the crew wore monkey jackets when they went on board the Mexican. Boatswain had a jacket, black. Ruiz, the carpenter, had a pair of Nankin trowsers —think he had a cape on. The day we boarded the Mexican the captain ordered us to shift about; some to wear hats, and some to wear caps; cannot read Spanish. Could distinguish the letter on the boxes brought from the Mexican, because I know four letters of the alphabet, P, D, O and U.

Peres here became impressed with the idea that the questions he was asked were put with a view to make him criminate himself, and got into a state of great excitement. He spoke in loud and rapid tones, struck his breast and the rail of the stand in which he was placed several times with great violence, and said he wanted to tell how the captain had divided the money, and made him and others take it. His object was to exculpate himself. The COURT was thrown into great confusion, and was unable, for a considerable time, to stop the voice of the witness. He was at last taken out, and being in a state of great exhaustion, refreshment was procured for him.

The COURT remarked that if the witness imagined he was criminating himself, in answering the questions of Mr. Child, that delusion ought to be removed from his mind.

Mr. Child objected, on the ground that if the witness was under the impression alluded to, he was still bound to speak the truth, and he thought that, possessing as the counsel for the prisoners did, such feeble materials for the defense, having no witnesses, they ought to be allowed the benefit of any thing that might fall from the witness under the existing state of his mind.

The *District Attorney* said the honor of the government had been pledged to the witness that if he spoke the truth, no harm should result to him. He thought it therefore his duty, both as regarded himself and the government, to do away with any such delusion as that which now rested on the mind of the witness.

Mr. Child here expressed himself very strongly in relation to the officer for the government and the court. He said he had never witnessed such an exercise of the power of the powerful against the weak, and stated that, from the most careful examination, he had become convinced of the innocence of the prisoners, and believed them to be victims of one of the vilest plots that had ever been invented.

Mr. Dunlap said he should not suffer personal feelings to influence him in this matter. It had been his desire upon this, as on all other occasions, to give the prisoners a fair trial, and he left the counsel for the prsoners to say whether if he had been disposed to have taken advantage against them, he had not had an opportunity of doing so. He did not deny the right of counsel to question the witness, or even to lay traps to catch him—to see if he had spoken falsely; but he did wish the witness to understand that this was not done by the government, who had pledged itself to bear him harmless. If the impressions under which the witness was laboring were not cleared up, he would believe that he was dealing with a faithless government; the anchor which bound him to the government would be broken, and he would act and speak accordingly.

After much further discussion it was agreed that the witness should be apprized of the true state of the case, which was accordingly done, and the cross-examination then proceeded.

Left the brig at 11 or 12 o'clock; first went aboard of her about 8; nothing was said of the money taken from her till after the English took the schooner; carried it away then from the place where it was first buried. There were only $11,000 of the remainder, the captain had $4,000 in his trunk, the rest had been spent for provisions and other articles.

The captain brought from Prince's Island a patent lever watch and a dressing case, the two cost $800. The dressing case contained a silver wash basin; he also brought two bales of tobacco; all was bought with the money taken from the Mexican.

When the Panda left Havana she had not on board so much as a quarter of a cent; I was captain's servant, and overhauled everything belonging to him thoroughly. The mate had $15, which he kept in his own hands. Capt. Gibert also brought from Prince's Island two bales of handkerchiefs, two frock coats, which cost $26 each, a piece of Guinea cloth, and some black and green paint. The paint, cloth, and one of the frock coats were intended as a present for the African king. The $4,000 in the captain's trunk were buried in the yard of the negro interpreter, when the English came up in their boats and took the schooner. Castillo helped me carry it. Boyga, Castillo, Guzman and myself, afterwards went to Cape Lopez for the $11,000, which we had carried there and buried when the English came up the river Nazareth in their boats; took the bags out, and the others counted the money. Made as much haste as possible, as the mosquitoes were biting my hands. $5,000 were buried for the captain. Boyga and Guzman buried the $5,000. The money was in canvas bags, and buried about half a yard deep. The money was dug up

four or five days after it had been carried to Cape Lopez. It was buried at first before the schooner was taken, and remained buried till after the English took her. The captain then sent word that all hands should run away, as the English were coming after them. The money that was buried at Nazareth remained there about four months. Part of it was carried off and buried among the mountains. Never heard of this money afterwards, as I and five others got on board a boat and started for Fernando Po. Before reaching the last named place threw all the money overboard. Was persuaded to do this by the boatswain; he said that if we carried it with us it would prove our condemnation. The money was divided by Capt. Gibert. He gave the mate $2,400; I received only $250. The captain called me to him; he was sitting on the floor with the money by his side. He said he gave me money to buy clothes with, and that I might go; as I had been wanting to go for some time. When I saw the captain he had a knife in his bosom. Think he intended to kill all who refused to take their share of the money. He gave the boatswain $500; Garcia, $400; Castillo $250; Montenegro $250 and Delgardo $300. Don't know whether others of the crew got any or not. All who went in the boat with me to Fernando Po had their money in bags. Placed the money in the bottom of the boat for ballast.

When first landed on the beach at Nazareth, the third mate ran away. Captain sent him $1000. The carpenter carried the money to him. Sent it to the negro interpreter's hut, whither third mate had fled. Afterwards saw the money in the hut; saw the mate there also, who said that the captain had sent the money to him. When the schooner was run ashore at Nazareth, the captain told them if they were captured by the English to say they belonged to a Spanish brig that had been cast away. All the wages I ever received from Capt. Gibert was a month's advance before he left Havana. Had served on board the Panda for nine months and a half; have no doubt if I had not taken my share of the division I would have been stabbed.

Captain had $4,000 in his trunk, $5,000 which was left for him at Cape Lopez, and what remained of the $6,000 which were divided among myself and others. Do not know how much remained of the $6,000. There was no rule of division among the crew of the Panda. The captain was sole owner of the vessel and did as he liked. Angel Garcia had $400, and I only $250; suppose because he was a working man and I only a boy. At Fernando Po told about the money that was hid at Cape Lopez and in the interpreter's yard. I and five others went in a boat from Nazareth to Fernando Po—all changed their names. Stopped at Camerone on the way; there was an English ship trading there; went on board of her, and said they belonged to a vessel that had been cast away; said this, that they might not be suspected of having money. It was the captain who ordered the Panda to be blown up in the river Nazareth. When the carpenter came ashore from

her in the canoe, he (the captain) asked why she had not been blown up; the carpenter said he did not know why an explosion had not taken place. The captain and mate asked him why he had not bursted a barrel of powder over the deck, loaded a gun, tied a fish-line to the lock and pulled it when he came off in the canoe. The cabin scuttle leads down into the magazine.

Sixty negroes had been bought with the cargo of the Panda, and the remainder had been sent off to buy more. Captain said he intended to take 450. The natives were against the English. Captain of the Panda asked the African king to let a guard of negroes stand upon the beach, armed with muskets to prevent the English from landing. When I reached Fernando Po asked if I belonged to the Panda, and said, no; but when they put me under oath I confessed. All the rest denied until the boatswain being confronted with a Portuguese, confessed. They were then examined before Governor Nichols, the captain of the English boat that brought them to Fernando Po, and some clerks. When I told them about the $20,000 taken from the Mexican, one of the clerks, who had an American paper in his hand, said, "very true, very true." Before I left Nazareth, a Portuguese pilot boat left that place to coax Capt. Gibert to Prince's Island that he might be caught. They told me if I did not tell all about the matter I would be hung; my heart failed me and I confessed; Delgardo also confessed a short time afterwards. The governor told Delgardo he need not be afraid, for he would write to England and get his pardon. Captain Trotter was present at these examinations. The rest of the crew were in the hospital; I was in the hospital when the boatswain of the Panda died. Presents or money were never offered to Delgardo to make him confess. His own fear made him tell all; he was told if he spoke truly he might get off with a short imprisonment.

Nov. 14.

Perez. I did not come here bribed by any one. Domingo Guzman had confessed on board the English vessel, that they had robbed two vessels, one besides the Mexican; in the former, however, they got no money; do not know of any inducements being held out to Delgardo, to make him confess. He confessed without the English saying a word to him. When Delgardo saw the corpse of the boatswain, he did not say: God forgive me for the false witness I have borne against you; do not remember whether I said at Fernando Po that I could not read or write; said so at Salem.

Mr. Child here gave Perez the indictment to read, and he read a part of it with greater facility than he did the previous day. Mr. Child then wished him to write. The COURT said that the counsel for the prisoners had no right to put the witness to this test. The *District Attorney* asked that the experiment be permitted to be made, under the proviso that the witness should not be called upon to write his own name, as many men could write that, who could write nothing else. Perez then came down from the stand and took up the pen,

reiterating the assertion that he could not write. He was asked, he said by the government at Fernando Po to sign his name to the deposition he made there, but he could not do it, and was therefore told to make his mark. Witness here made an effort to write, but finding he could not, threw down the pen in despair. The COURT wished it to be understood that this trial of the witness, although permitted, could not be legally called for by the prisoner's counsel.

Cross-examination continued. Did not distrust Capt. Trotter's promises to me at Fernando Po, and say I only made my mark that I might thereafter disavow it as my signature. Was asked by Capt. Gibert and the mate, when in prison in England, if I had signed my deposition at Fernando Po; said I had made a mark, and they then said: "No matter, you must deny everything." Have conversed with the black cook of the Panda, Antonio Ferrer. Told the cook at Plymouth while they were confined on board a seventy-four there, that the captain wanted me to deny everything, so that he (the captain) might himself turn State's evidence, and hang all the crew. Captain and mate tried several times to induce me to deny everything. Out of ten words of English can perhaps understand five; was in Salem when the crew of the Mexican testified; saw the captain and cook of that vessel; heard them talking and could not understand them; saw them making signs and pointing out the prisoners whom they knew—think I recognized the captain of the Mexican; believe he was one of those who came alongside the schooner in the brig's boat; never confessed at Salem, was only asked to identify my mark at the bottom of the deposition made at Fernando Po; did not recognize any others but the captain, there were so many white people present, and white people are so much like each other. The vessel in which the captain and mate went from Nazareth was afterwards a prize to the Curlew; believe she was given up afterwards as a bad prize; don't know whether she was taken because she had pirates on board. She was released in England about twelve or thirteen days before we left for America; do not know whether Capt. Trotter told when we reached England that he had pirates on board; saw some English newspapers, never read them, none of the crew of the Panda except myself were ever permitted to go at large; Castillo went in the boat once, to carry an officer on shore. Capt Trotter did not put the mate and captain of the Panda in irons. They were all shut up in a room together. After some time an order came for them to be permitted to walk the deck. Delgardo was with me; was handcuffed to him when they came ashore at Salem. Capt. Gibert used to go on deck in his chains; any of the prisoners might do this. When Castillo went on shore with the mate could not have escaped if he had wished; they were guarded when on board a seventy-four at Plymouth.

The vessel lay in the stream and was never moved into the harbor; never heard of any one offering to assist them to escape,

never. They were not permitted to speak to any one except in the presence of a sentinel. On board the Panda was a sailor who could speak English, his name was Perico; he was a fat white man; do not know his country; he died on board the schooner. Perico was a Spaniard, but had sailed on board an American brig. The powder of the Panda was stowed in her hold at Havana; I had not been concerned in the war between Spain and her colonies. Have been on board both Danish and French merchantmen. Do not know who was the commander of the Spanish forces during the Columbian war. Never knew General Morillo. Never served on board any man-of-war.

Peres on seeing some papers between Messrs. *Hilliard* and *Child*, the counsel for the prisoners, expressed a fear that something was going wrong; but on being informed by the interpreter that the two gentlemen were connected in the case, he became satisfied. He was directed to be removed for a few minutes, and on his return the cross-examination proceeded, but he soon lost all patience, and with much gesticulation and energy, protested that he would not answer any more questions, being certain that they were dictated by the prisoners. He was at last, however, induced to continue his statements.

Was on board a Spanish schooner as cabin boy during the war between Spain and Columbia. During the time of Morillo was taken prisoner in a brig called the Eagle and carried into Havana. Brig was taken because she had slaves on board. Nicholas Costa was cabin boy on board the Eagle, and afterwards on board the Panda. Black boy (Antonio Ferrer) belonged to Maracaibo; never told him to say he was a slave. Don't know whether he is a slave or not. Knew him to be an African, by the marks on his face. Have heard others say that he was a slave. His name is put in the roll as born in the Havana. Was not aware when I shipped that the Panda was going on a piratical cruise. All vessels leaving Havana for the coast of Africa are examined by the General of Marines. Panda and crew were not examined; don't know reason why she was not. Delgardo came from Spain in company with me. If I had known the Captain of the Panda, would sooner have stayed on shore and eaten dirt than have gone with him. Did not know Panda had any guns on board when I shipped. When she was in river Nazareth, carpenter carried all her papers on shore and gave them to the captain. Never knew what became of them afterwards. When Panda left Havana she bore a Spanish flag. Her papers were all good. Can't tell whether Panda was or was not boarded by officers when off Havana. An English ship was robbed by the crew of the Panda previously to the robbery of the Mexican. Most implicit obedience was paid to Capt. Gibert by the crew of the Panda. Don't think the crew feared him, but obeyed all his orders. The English corvette was robbed about eight days after we left Havana; chased her some time before we came up with her. On coming

up, Capt. Gibert hailed the English captain and ordered him to come on board. The latter said his boat leaked so badly, would not be able to keep her afloat. Capt. Gibert again told the English captain to come on board quickly. The English then launched their boat, and the captain, boatswain and two men came on board the schooner. The corvette was robbed of five goats, one cheese, several cases of preserves, cordials, etc., and two half coils of rigging. No other piracy was committed after the robbery of the Mexican. Capt. Gibert often expressed a wish to sink a Spanish vessel lying at Petty Sestos. Made preparations, but did not do it, because the sea ran so high. Never received any money in England from Captain Trotter; the Spanish consul at Plymouth tried to make me confess that I had been bribed.

Did not get a good deal of rum at Fernando Po; had no money to get it; never confessed that I was drunk at the time I made my deposition, and the scoundrel who says I was is a liar! Prisoners at Fernando Po confessed that they had robbed an English corvette as well as the Mexican, and that they took away from her several monkey jackets, shirts and the cabin curtains. The money boxes and bags taken from the Mexican contained about a thousand dollars each, and were made of something like velvet.

When the money was taken out of the boxes it was put into bags made of dark coarse linen, these bags rotted, and others were made to receive the money; the boxes were thrown overboard when emptied; do not know what sort of wood the boxes were made of; the captain took the money up and shook it round in bags, to see if there was any yellow money among it; did not go close to the boxes, but thought I saw something black like iron round the edge of each; they were counting the money all the time I was in the foretop; it was all spread out on the companion way.

George H. Quentin. Am an officer in the Royal Navy of Great Britain; hold the rank of Master's Assistant (i. e. midshipman). Came to the United States in the Savage, an English ten-gun brig. All the prisoners now present came with me. Arrived at Salem on the 22d August. Was previously in the Curlew, commanded by Henry Dundas Trotter; left the Cape of Good Hope in January, 1832, for the Coast of Africa. Arrived at Prince's Island about March. While there received information in May, 1833, of the robbery of the brig Mexican, by a vessel answering the description of a schooner then lying in the river Nazareth. Sailed immediately for the latter place, and arrived there 4th June. Three boats, containing in all forty men and commanded by Capt Trotter, went up the river. Just after daylight got sight of her at anchor; pulled in shore to avoid being seen; when we came within a mile of her, hoisted the British colors. Soon as they saw us they took to their boats and made for the shore, excepting one man, and he soon after left in a canoe. Capt. Trotter chased them with his own boat only, but could not come up with them, and therefore returned to the schooner,

which we found on fire; was the first that boarded her. The first thing we did was to put out the fire which we found in the magazine below the cabin floor. One of our men went down and found a quantity of cotton and brimstone burning, also a slow match ignited and communicating with the magazine. The magazine contained fourteen or sixteen quarter casks of powder; looked for the ship's papers and log-book; did not find them. We then bent the schooner's sails, and went up the river. Had the vessel in our possession ten or twelve days; she was a long, low, two topsail schooner; she was sharp, and her masts raked a great deal; her figure-head was cut off; no name on her stern; her deck was that of a slaver, with a grated hatchway. Tried to get possession of the crew, but could not. When we left the river, we took an inventory of everything there was on board; then sailed for Cape Lopez, where the schooner blew up; was supposed that a spark of fire got into the magazine. We lost two officers and two men. She had a long brass pivot gun abaft the mainmast, and two short carronades; a six and a nine pounder. We got one of the Panda's crew before we left the river (Simon Domingo, the Portuguese). We took four Portuguese afterwards; one of them (Antonio Silvera) and the man first taken (Domingo), came with me in the Savage, and are now in Boston. A boat was sent up to the African king, and he promised to give the prisoners up. When we went for them the next morning, the Prince came down and said they should be brought to us as soon as 'the sun had gone to dinner' (12 o'clock). The men, however, were never sent. We secured five of the Panda's crew at Fernando Po—and the captain, the boy (Costa), Velazquez and cook at Cape Lopez. They were kept on board the Curlew during the cruise, and then sent to England. Four or five were apprehended at St. Thomas. The prisoners were taken first to Plymouth, and lastly to Portsmouth, from which place they were brought to the United States.

Cross-examined. The Esperanza was taken on suspicion of aiding the crew of the Panda; have heard that she carried some of the prisoners and their money to Fernando Po. Two or three of the crew of the Esperanza were taken to Portsmouth, and some landed elsewhere. Don't know whether the vessel was libelled in England; don't know whether she was announced as a pirate. The Esperanza carried the English flag and pennant some time after her capture. It is customary to hoist the English flag when we take a prize, but not the pennant. No English officer has a right to hoist the pennant on any prize. Don't think the arrival of the prisoners was announced in England. Some of them were in irons on board the Curlew. Two of them went ashore with me in a boat—Castillo and Garcia were the men. One of our men was with them when I left the boat, but got drunk while I was away. Castillo and Garcia might have run away if they liked, but I think they would been speedily retaken, as they did not know the language; gave them something to drink; they rowed me

ashore. Don't think Perez was in the boat; there were only two of the prisoners, and they were the men whom I have mentioned. Remember going to the river Bona in the Curlew. Some of the prisoners were on board the Esperanza, and others on board the Curlew. The mate, the carpenter, and three others were in irons. Captain of the Panda did some translations for Captain Trotter; Captain Trotter might have regaled him with wine and brandy. When we were in the River Bona, the Esperanza got aground rather less than a mile from the shore; a great many of our hands had gone up the river in boats; fourteen or fifteen only remained on board. Don't know whether all the prisoners were on board her at the time. They assisted our men readily in getting her afloat again. Do not think the prisoners outnumbered our men. While at Nazareth, consider we were in some danger from the natives—can't tell whether it was by the intercession of the captain and mate of the Panda that Captain Trotter was not killed. A search was made to find the money taken from the Mexican, but it was unsuccessful. Captain Trotter recovered $683 of it at Cape Lopez. I know of no place where slaves cannot be purchased for money, excepting in the interior. The natives take the dollars to the English merchants, and get goods.

The principal object of the Curlew was the capture of slavers. Four years is not an extraordinary cruise for such a vessel as the Curlew. All the men belonging to the Curlew and Panda were sent ashore. Prisoners were guarded by sentinels; they were allowed to go into the skirts of the town. Don't know whether prisoners were in irons; did not see irons on them; did not see them go ashore. Saw the captain and mate of the Panda in irons on board the Curlew. Do not know whether the sentinels were placed to guard the English crew as well as the prisoners. Cannot say whether there was any part of the crew of the Curlew appointed especially to perform guard duty.

Ascension is a small island, perhaps 14 or 15 miles in circumference. Curlew's people were mostly employed about the vessel; some allowed to go ashore when they chose; don't know what they did on shore. There were about four hundred soldiers in the town—also a few boats belonging to the island, and our own boat lying on the beach. A sentry was stationed at the end of the wharf. No boats in any other part of the town; there are no boats owned by the inhabitants; a guard from the garrison is constantly stationed over the boats; wharf forms part of the fortifications. Captain Trotter did not cruise after a prize to replace the Panda, that I know of. He (Captain Trotter) could not return to England without orders; am sure of this; did not show me his sailing orders; was not accustomed to do so. Think there are about four hundred inhabitants in Ascension; they reside in two parts of the island. Prisoners could not have procured a boat to leave the island, unless they cut down a tree and made one for themselves. Prisoners never tried to escape, to my knowledge. Once,

while in Cape Lopez, we had more prisoners than men of our own; there was then some appearance of a rising among the prisoners; never at any other time.

While at Cape Lopez, Captain Trotter and some of our men were taken prisoners by the African king—were taken on Sunday and kept till Wednesday—it required considerable negotiation to get them free—Captain Trotter was never anxious on account of the capture of the Panda or the Esperanza—I was in Fernando Po when Perez was examined—Captain Trotter, in company with the surgeon and interpreter, examined all the prisoners—no offers or promises were made to any one, to induce them to testify against the crew of the Panda—Captain Trotter said nothing about his liability to respond for the loss of the Panda; Panda's cargo consisted of 60 or 70 bags of rice and farina together, 16 or 17 qr. casks of powder, 2 casks of American bread, a few barrels of pork and beef, and a small quantity of other provisions; a few muskets, one pair of pistols, and some cutlasses were also found on board; think Captain Trotter transmitted all the money taken from the Panda or her crew to the Treasurer of the Navy—no division was made of it—had there been, should have received a share The cook (Ferrer) had no inducement offered him to make him testify—don't know Jose Perez's state as regards intoxication, while he was examined—know nothing of the boatswain's death—four prisoners were taken by Captain Trotter in River Nazareth; one died, don't recollect his name, and one deserted—one was discharged; prisoners were never urged by Captain Trotter to give their depositions, that I know of.

November 15.

George H. Quentin. Found a U. S. ensign and pennant on board the Panda, when she was captured; also two Spanish and one French ensign. There was no firing at the Panda—a musket or two was discharged at the men who left her in a canoe, and that was all—the fire was not returned—have no knowledge of any feeling of hostility existing on the part of the crew of the Panda towards the English—the guns of the Panda were never fired at the negro canoes—remember some of our men being flogged, but it was for insolence and drunkenness—am sure that the pivot gun was not fired at the negro canoes—the men broached a cask of rum, of which there were eight or nine casks on board—the inventory and duplicate taken on board the Panda were both destroyed—the officers killed on board the Panda, by the explosion, were named Percy and Johnson—the gunner, a marine and a mulatto boy, were also killed—there were perhaps twenty-five persons on board the Panda, when she blew up—was between the brig Curlew and the schooner when the explosion took place.

Mr. Child asking a question of the witness.

The COURT remarked the gentleman had answered that question before.

Mr. Child. We do not know gentle or simple here.

JUDGE STORY. If there is aught exceptionable in my usage of the word gentleman, I will use the word man, although I consider that all present are entitled to the former appellation.

Cross-examination continued. Do not know whether the powder which was placed in the cabin to blow up the vessel was in a bag or not; saw a bag hauled up; also a match still burning; the name of the man who first went down is Trumbull; know nothing of Trumbull's having refused to swear that there was a match in the cabin—did not find a swivel on board the Panda—it is usual to place the national flag of a prize under that of her captor—it was not done in the case of the Esperanza. There is a Spanish consul at Plymouth—can't say whether he is a Spaniard or an Englishman—do not know that he is connected in any way with Captain Trotter, or that Captan Gibert and his mate wrote to the Consul General in London—do not know of any letters being intercepted—can't remember whether the Consul at Plymouth had a foreign accent—only saw him five minutes—he came on board in a citizen's dress—don't know of the Portuguese Consul's doing any thing for the prisoners—or of any communication having passed between him and the Consul General in Spain—never heard anything of the prisoners expecting to be tried in London, or of their demanding a trial—know of no pirates about the Cape de Verd Islands—heard something of one being off St. Thomas—Captain Trotter is in an ill state of health—has had a fever several times. Did not hail the boats of the Panda before firing, because could not get near enough—have no knowledge of Captain Trotter's having the protest of Captain Gibert—the diamond ring taken by Captain Trotter, from the mate of the Panda, bore the initials B. S.—don't know whether these letters are the initials of the mate and his wife—there was no hair round the ring on the outside—was not present when Captain Trotter took the mate's watch—don't know whether the slaves on board the Esperanza had free papers—was not present at their examination—know nothing of attempts to frighten them by pointing guns at them—a mark was placed on the Esperanza, at which the crew of the Curlew practiced firing—the passage of the Curlew home was retarded in consequence of having to wait for orders—do not know whether Captain Trotter proposed to give up the Esperanza to her owners—don't know whether our arrival was announced.

Mr. Child showed the witness an English paper, and asked him if it did not contain an announcement of the Curlew's arrival. It did. Two of the crew of the Esperanza were brought to England, the boatswain and cook; also one or two others—do not know what has become of them, or whether they were discharged.

Mr. Child said that he observed a disposition on the part of the officer of the Government "to restrict the prisoners."

Mr. Dunlap. I scarcely know what Mr. Child means by restricting the prisoners. I believe the other counsel (Mr. Hilliard) would not say what Mr. Child had said.

Mr. Hilliard was perfectly satisfied with the conduct of the District Attorney on this as on all other occasions, and should always feel happy in being opposed to the gentleman.

Simon Domingo. [Witness identified the captain, and mate, and the remainder of the prisoners.] Went with the Panda from Prince's Island to the River Nazareth. When arrived there, came to an anchor, and lay there for four months, "doing nothing." They had previously traded for negroes. Soon as they came to anchor, the captain and officers all went ashore, and I saw no more of them on board. The schooner was afterwards set on fire and sunk. She was boarded by the English in four boats. The carpenter tried to set her on fire, and the crew all took to their boats and went ashore. The carpenter was the last man on board, and went ashore in a canoe; do not know how the carpenter meant to set the vessel on fire; saw him take fire from the galley, got scared, and went into the boats; went on shore, and staid some time on the beach—afterwards returned to the Panda, of which the English had then possession. When I joined the Panda, she was under the Spanish flag; heard all the prisoners say that the Panda came from Havana.

Cross-examined. Was four months on board the Panda. Heard some of the prisoners confess to the captain of the English brig; know of no inducement held out to them to make them confess; some of them are here who confessed; some confessed on shore at Fernando Po; one only on board the brig—the rest denied it. The one who confessed on board the brig was a small mulatto, named Domingo Guzman. He is now present. The confession was made to the captain of the Curlew in the cabin. The prisoners were called in singly; was present in irons; heard all that was said; was called in to interpret what I could, as Captain Trotter did not understand the Indian language; confession was written down by Captain Trotter. Being on shore at Fernando Po, heard the other prisoners confess before Guzman made his confession. All the others, five in number, confessed together. Know all their names. They are Montenegro, Garcia, Castillo, Perez, and Delgardo. All refused to state any thing at first, but told all afterwards; think the confession of Perez was written down, as all the English were writing at the time. Remember seeing the justice writing, but don't know what he wrote. Plenty of people present. Know Captain Trotter was present. All the prisoners were in one room, but called up singly to be examined. Perez confessed first and boatswain next; did not see boatswain sign any thing; all were sworn by the justice before confessing. Castillo next confessed. Two of those who confessed are dead—the boatswain and Delgardo. During the four months that I was on board the Panda, never heard any thing said of the robbery of the Mex-

ican. Went on shore at Nazareth by Captain Trotter's orders, to search for the hidden money. Two of the prisoners guided us. Found no money. Prisoners were accompanied by an English officer, to whom they were obedient; they showed him the place where it was first buried, but could not tell where it had been taken to. The English captain got some money, but don't know how much; took it away from Captain Gibert, at Cape Lopez; was a prisoner, but not in irons. Never shipped for wages on board the Curlew, nor did any work, excepting jobs for the men, for which I got a few coppers. Don't know whether Custom House officers came on board at Prince's Island, for she set sail the very day he came on board. Think she had been lying about a month at Prince's Island. There were several other vessels lying at Prince's Island at the same time. Heard that the Curlew was on the other side of the island. Saw a steam vessel of war near the island.

Do not know the consignee of the Panda at Prince's Island. Do not know whether the governor of the island was the consignee. Captain Gibert was frequently at the governor's house. Bernardo de Soto was sick and told me he had been lodging at the governor's house. Every thing that came on board the Panda came from the governor's. When the Panda left Prince's Island she went straight to Cape Lopez, and thence to the River Nazareth. When they sailed from Prince's Island, a Custom House boat came and took the guard away; never saw but one guard. The Panda was not chased from Prince's Island to Cape Lopez. When she reached the latter place she came to an anchor the first day and got under way the second, upon which occasion she touched on the bar —she did so by accident. Captain went on shore and took his trunk with him; do not know what it contained, but two negroes carried it for him. Third mate was aboard at this time, and had a quarrel with the boatswain, whom he stabbed in the arm. The former went on shore shortly afterwards and I never saw him again. They did not fire on the Panda when they took her; all the firing that took place was in the evening when the Panda was surrounded by natives in their canoes. The English fired the pivot gun at them; the gun had no shot in it —nothing but powder and wadding; it was fired by Captain Trotter's orders. Captain Trotter did not flog any one for firing the gun; there were some men flogged after the Panda had got out of the river—but they were flogged because they had been drunk. When the English boats were seen coming, the carpenter of the Panda said he would blow her up, and one of his comrades said, "yes, blow her up, blow her up;" there was much confusion on board, and all the crew ran for the boat. Saw the carpenter with a keg of powder and a chunk of fire, but the English were so close that he could not use them, and threw them overboard; he then got into a canoe and went ashore. Not sure as to the number of the English—think there were about thirty; they went ashore the same day to pursue the crew of

the Panda; did not go after them themselves but sent the negroes who were standing armed on the beach; there was a great number of negroes; don't know how many; they extended all along the beach.

Captain Trotter went to the king two or three times to demand the prisoners. At last went with the crew to take the prisoners by force. Don't know that Captain Gibert and men interceded with the king not to hurt the English. When the Panda was blown up, part of the English were saved in their own small boats, and some of them by the crew of a small vessel belonging to Prince's Island. When the Panda was taken, she was not hailed by the English, but they came directly on board of her. Don't know that Captain Trotter was desirous of restoring the Panda to Captain Gibert, or the Esperanza to her owners; he had no intention of restoring either. Captain Trotter took the Esperanza to England; she was taken because they had suspicions of her being accessory with the pirates, and because she had transported some of them from one place to another. Don't know whether she proved a good prize or not. The Esperanza was taken up to London by her boatswain after she arrived in England; don't know what was done with her. I went to England in the Curlew. The Panda's men on the passage to England, were some of them in irons and some not; all were aft together. Captain Gibert was in irons part of the time—Captain Gibert during the passage to England wrote occasionally for Captain Trotter. I did some trifling work for the English officers; was paid for it. The prisoners were allowed to walk the deck during the day; at night were all put in irons, and sentries placed over them. Don't know that the prisoners were allowed to go on shore; cannot tell how long Curlew cruised after prisoners were taken—she made several cruises; did not go into port often. Captain Trotter was sick when he took the Spanish Captain and went to Fernando Po for the recovery of his health; was sick several times on the passage home; from the time he commenced to look for the prisoners, was always ill by spells. The Curlew stopped at Ascension, and all the crew went ashore except those who stayed to keep watch. Prisoners were all put on shore; they were not in irons; they were allowed to range over the island during the day; at night they were put in barracks and sentinels placed over them; marines with muskets guarded the tents. All the liquor I saw distributed on board the Curlew was given at dinner—and then it was not raw, but mixed with water. Perez was not on board the brig, but in the schooner.

When Perez came on board the brig he was put in irons; was afterwards liberated and employed in carrying food to prisoners; never heard of his having received any presents, or having been threatened with punishment to induce him to confess. He did not receive part of the money taken from Captain Gibert; only one dollar was given him for bread money. Captain Trotter offered the same to any man who would not demand his

share of the bread. The English crew were not called up to take their share of any money. Captain Gibert went on shore when the Panda reached Nazareth, and came again in two months; he was sick on board five days; when he recovered, he went on shore again, and did not come on board any more. Think captain went on board once after that when I was on shore, but am not certain. Panda had nothing on board when taken but provisions and water; she had no straw mats nor palm oil; there were plenty of muskets and pistols on board—also rice, farina, four or five barrels of rum, and some bread; do not know how many flags there were on board.

Anastasio Sivera. Am 23 years of age. Shipped on board the Panda on the 9th of February, 1833. [Witness identified Captain Gibert, the mate, and the rest of the prisoners.] Went first to Cape Lopez in her; thence to Nazareth. They ran her ashore at Cape Lopez, intending to burn her—upon which occasion they put me and three other Portuguese on shore. The vessel was got off afterwards and went up the river; belonged to her four months after that, during all which time she lay in the river. After she had been there some little time, Captain Gibert came to Cape Lopez, and sent me and others on board again. Captain and mate lived on shore, as did part of the crew—only eight or nine remained on board. Did not see the cargo she brought from Havana, but know she took in slaves, because saw them. When the English boats came up the river on the 4th of June, 1833, the carpenter told all to get into the boat and go ashore, as he was about to set fire to the schooner. Carpenter was last man who left the schooner. I went to the barracoon where the captain was; staid there one day; the captain turned me and the rest of the Portuguese off, saying he could not support us.

November 16.

I went to a negro hut, and staid there nine or ten days. The schooner was taken out of the river, but returned at the end of twelve or fifteen days. There was a Portuguese schooner lying there; went on board and asked captain to give me passage to Prince's Island; captain said he would. Captain Trotter was on board at the time; took him prisoner, and ordered him to be put on board the schooner Panda. Captain Trotter came there shortly afterwards himself, and commenced firing on the town; at the second gun, the schooner blew up. We were then put on board a small Portuguese sloop that lay near, and from thence on board the Curlew. Shipped on board the Panda for the voyage out and back to Havana, and was to receive one hundred and twenty dollars. Don't know what the other Portuguese shipped for, but one of them was to have received the same as myself. The Panda was a two-topsail schooner, long and slim; she had a brass pivot gun abaft the mainmast, and two iron carronades; she had no swivel on board; she had no regular head, but a sort of a billet-head. It was a long slim piece of wood, turned up at the end.

Capt. Jeremiah Briggs. Have commanded a merchantman 32 years. Voyages have been generally to the East Indies. Have been to Rio, and other South American ports. It is customary, when hailed, if from Salem, to answer from Boston, as Boston is a port more known than Salem, particularly to foreign navigators; was never on the coast of Guinea.

Mr. Dunlap. Suppose a clipper, bound for the coast of Africa, to sail from the Havana on the 20th of August; and such a vessel as the Mexican, a dull sailer, to start from Salem the 29th, for Rio Janeiro; would they be likely to meet, and if so, where? They would be more likely to meet in lat. 33, lon. 34-30 (the place where the Mexican was robbed), than at any other spot on the chart. The schooner would have to sail about one thousand miles more than the other. The route to the East Indies and the Brazils, is the same as to Rio.

Mr. Dunlap. Suppose the vessels started, the Mexican on the 29th, and the clipper on the 26th, would they then be likely to meet? I think, if there were no difference in their rates of sailing, the brig ought to be ahead of the schooner. If they met, however, at all, they would meet at the point above stated (lat. 30, lon. 34-30).

Cross-examined. I never made the voyage to Africa, but have been in sight of the coast of Guinea. Know the different rates of sailing between a clipper and such vessels as the Mexican. It would depend greatly on the wind; but the schooner, in a light wind, and sailing on the wind, would beat the brig one-half. In a strong wind and a fresh sea, going free, the schooner would not beat the brig so much. The latter would, perhaps, go nine knots, and the former eleven.

November 17.

Capt. Benj. Rich. A vessel sailing from Salem to S. America or the East Indies, would cross the line at 22 or 26 lon.; not lower than 27. In going from Salem, she would steer to the east as far as lon. 30 or 35. A fast vessel would not go so far before she would haul to take the trade winds. A vessel sailing from the Havana on the 20th of August, would pass out of the gulf of Florida, and keep the gulf stream till she arrived near Cape Hatteras; she would then strike off to the east, keeping a little north, and as she approached our coast, could not be a great distance from any vessel which left Salem on the 29th of August.

Mr. Dunlap. Suppose the clipper sailed from the Havana on the 26th, and the brig on the 29th, would they still be likely to meet, or not? They would come near each other, because at that season of the year, the clipper would get along very fast. The winds in August are light, and would give her great advantage over the brig.

Cross-examined. The runs made by merchantmen depend entirely upon the winds they may happen to have. The Liverpool packets make up from about one hundred to one hun-

dred and twenty miles per day. Their average rate of sailing is one hundred and twenty miles in summer, and one hundred and sixty or one hundred and seventy in winter. The passage from New York to Liverpool is made, during the summer, in from twenty-seven to thirty-three days. But the yards of the packet ships are squarer than those of ordinary merchantmen, and they carry a heavier crew. As an average, it may be said that the former sail a knot an hour faster than the latter. A clipper will, in summer, make a passage in a third less time than one of our merchantmen; but in the winter there will be little difference in the sailing of the two vessels. In general, a clipper may be said to sail, in light winds, fifty per cent faster than a merchantman.

Captains George Budd, Joseph Bacon, Jellison, and *Devens* were next examined, and all agreed in the probability of the Panda falling in with the Mexican in lat. 33, lon. 34-30.

W. H. Peyton. The tonnage of American and Spanish vessels is different. Ninety-five tons Spanish, is equal to about one hundred and twenty American. Think the Panda and Mexican would meet, lat. 32, lon. 37. Never went further north, in my voyages, than 32 N. Have gone through the Bahama Canal in eight and in nine days. Ordinary passage is eight days. Don't know average rate of vessels sailing in the Atlantic. In good breezes, will run twelve knots per hour, at other times five, three, and more or less, according to the wind. Average after passing Bahama, may be eight or nine knots. Should think a passage, in a sharp built vessel, from Havana to the point of southing (lat. 32, lon. 37), might be made in twenty-eight days. Spanish dollars are current on the whole coast of Africa. Money is less valued at Annabon than other places on the coast. Not so much trade there as at other places. Don't know tonnage of the Panda. It is difficult to determine the tonnage of vessels, by merely seeing them in the water. Might vary, in an estimate, fifty tons.

THE WITNESSES FOR THE DEFENSE.

Baptista Arana. Have been mate and captain many years. Command a brig now lying in this harbor. Has been four voyages from Cadiz to Lima, one to Porto Rico, and three to the coast of Africa. Have cruised on the coast of Africa, and am well acquainted with vessels trading from Havana to the coast. Always take specie on board: generally smuggle it. Never knew vessel to go without specie on board. Specie is not entered on account of the duties. Some vessels carry ten, some fifteen, some twenty thousand dollars: the amount of specie carried, depends on what part of the coast the vessel trades to. Money is valued more on some parts than others. The usual articles of cargo are handkerchiefs and cottons of various kinds, etc. Vessels do not generally carry more than eight thousand dollars. They generally take spare spars on board; are provided

with a stock of the best provisions, such as beef, pork, etc.; take but little bread, as it spoils on the coast, owing to the heat of the weather.

Mr. Dunlap asked the witness if he had not been in the slave trade.

Mr. Child objected to the question as irrelevant.

JUDGE STORY did not think so, as the query concerned the gentleman's (he begged pardon) the witness's character.

Mr. Dunlap again put his question, when the witness replied, that when he could not get ivory, he had certainly dealt in slaves.

November 18.

The *District Attorney* stated that an officer had called upon him last evening, and asked his opinion whether or not he had done wrong in permitting an individual to speak to one of the jurors in his (the officer's) presence; the conversation relating wholly to a cargo of fish, and having no connection with the present case. *Mr. Dunlap* said he did not mention this from any desire to subject the officer to punishment or reprimand, but simply from a desire that the Court should express such an opinion as would serve for the future regulation of the matter; both jurors and officers at present believing that they were justified in acting as above mentioned.

The COURT stated that there were some cases in which it would be unjust, cruel, and against the interests of justice, to refuse a certain degree of liberty to jurors. In the present case, a juror had been taken ill, and had sent for and been visited by a physician. The permission of the Court ought, however, to be obtained, whenever possible, as it was of the utmost importance, during a capital trial, that jurors should be kept from intercourse with any but the individuals of their own number.

After some remarks from *Mr. Dunlap* and *Mr. Child*, it was agreed that the jurors in the present case should be permitted to have intercourse with their friends, and to send written instructions for the regulation of their affairs, providing always that such interviews and instructions take place and be given in the presence of their colleagues and the officer to whose care they had been entrusted.

Captain Arana. It was not likely the Panda and Mexican could meet at the point where the latter was robbed. Should they do so, it would be a miracle; as the clipper, sailing so much faster than the Mexican, ought to be greatly ahead of that vessel. The weather in the months of August and September would be favorable for the schooner's passage from Havana. The worst weather she would have would be off the Bermudas.

Santiago Elorza. Have followed the sea five years, and have been an officer three years. Have been one voyage to Africa from the Havana, and one from Cadiz. There is a great difference between the sailing of clippers and ordinary merchantmen. The former is built entirely for sailing, and the latter for burden. Has seen eleven and a half knots got out of a clipper, while the brig I am in now, would not go, with the same wind, more than

six, or six and a half. A clipper will, on an average, sail one-third faster than a merchant vessel. The Panda and Mexican, would not be likely to meet, because the schooner ought to be much ahead of the brig. Am well acquainted with the currency on the African coast. Spanish dollars are current there—even doubloons and ounces will pass. Has been on the coast as far as Congo, and thirty leagues up the river. Petty Sestos and Nyphoo are not the same places. Vessels going from the Havana always carry specie. If they had a full cargo, fitted for traffic with the natives, they would carry about one or two thousand dollars. It is five thousand two hundred and eighty miles from Havana to Cape Monte. Am acquainted with Captain Gibert; he bears a good character in Havana, among the most respectable mercantile houses. Have also heard Bernardo de Soto spoken well of by captains and merchants. Do not know whether Captain Gibert has any property. Know that de Soto owned a schooner in '32, and that he sold her. Afterwards, heard that he had bought the Panda, and gone out in her. In '27, Captain Gibert was concerned in a mercantile house; think the goods in their warehouse might be worth from eight to ten thousand dollars.

Cross-examined. By being in the African trade, I mean to say that I have been the slave trade; the English themselves sell slaves.

Captain Joseph Smith. Have been twenty-five years in the Navy of the United States, as a midshipman, lieutenant and master-commandant. Have examined the course of the Mexican, as marked on her chart, she must be a dull sailer not to have got farther in twenty days than 33—34.30. Should think the difference of sailing between such a vessel and a clipper, in a light wind, would be twenty-five per cent. In rough weather, it would not be so much; not more than ten per cent. In August and September, the winds, in the latitude in question, are westerly and southerly. In making the passage from Havana to Africa, the clipper would, probably, get out of the Gulf Stream in three days, and go north as far as lat. 30 or 35 [place where Mexican was robbed] in order to get a favorable wind. The clipper would reach the above latitude in about six days from Havana. Do not think the schooner and brig could meet.

Cross-examined. If the vessels should meet, it would be about where the Mexican was met by the pirate.

Captain Bethune. Have been ten or twelve years acquainted with nautical matters. Do not know much about clippers, but should think there was twenty or twenty-five per cent difference between their rate of sailing and that of merchantmen. It is mere matter of opinion, whether the Panda and Mexican would meet; but I should think it probable that they would.

Edward H. Faucon. Have been to sea twelve years; am master of a vessel, and in the employ of Bryant & Sturgis; do not know the difference in sailing between a clipper and merchantman, excepting by reputation; should think there would be thirty per cent difference in favor of the clipper; should

think from what I see of the Mexican's track, that she was a dull sailer, and there would be full a difference of one-third, between her and a Baltimore clipper, in smooth water. The meeting of the Panda and Mexican, the one sailing on the 20th from Havana, and the other from Salem, on the 29th, would be very improbable, but not impossible. I should think the Panda would be at the Cape de Verds by the 20th of September. To pass through the Bahama Channel, and reach 30 N., would occupy, in my opinion, about five days.

Cross-examined. My opinion that the vessels would not meet, is based upon the supposition that neither would meet with any accident or hindrance.

Samuel Austin Turner. Have been six years a midshipman in the United States Navy. Have made voyages to the East Indies. Know the Mexican. Should think, in a royal breeze, she would run six knots, while a clipper would sail one-third faster. In a fresh, fair wind, the difference would be smaller—perhaps none at all. Don't think the brig would ever have the advantage of the clipper. Never sailed in a clipper, nor through the Bahama Channel. Do not think the Mexican and Panda would meet [1]the one sailing on the 20th and the other on the 29th of August. Am of opinion they would be one hundred miles apart.

Cross-examined. My opinion is predicated on the belief that both vessels made the best of their way.

W. S. Bruce. Am somewhat acquainted with Bernardo de Soto. Have resided several years at the Havana, and my knowledge of the prisoner commenced in the fall of '31. De Soto was then captain of the Spanish brig Leon, from Philadelphia to Havana. During one of his voyages from Philadelphia to the latter place, he saved and brought in the crew and passengers of the American ship Minerva, which had taken fire. The passengers were thirty or forty in number (chiefly Irish) going to New Orleans or Mobile. De Soto's conduct was very highly spoken of at the time in Havana, and he was presented with a piece of plate, by the merchants of New Orleans. Don't know that any one has asked him (de Soto) to become a witness against rest of prisoners. District Attorney did not request me to go to him. Did not intimate to me his wish or willingness that de Soto should be a witness. Should not have conjectured anything of the kind from the District Attorney's conversation. Formed my opinion of the District Attorney's wishes from what was told me by a third person. That person was Charles W. Story. I told de Soto that he had better become a witness.

Mr. Dunlap. Had you ever conversed with me before you saw de Soto? Yes, both before and afterwards. Recollect yourself. You did not say anything particular the first time. Did you ever converse with me more than once? No. Did you not, upon that occasion, state to me what had passed between yourself and de Soto? Yes. Then, of course, sir, you never conversed with me before you saw de Soto.

Mr. Bruce. As to persons engaged in the slave trade, being

so engaged was not considered in Havana to disparage any man's character.

Isaac A. Coolidge, the under keeper of the jail, was asked to identify the colored men, Ridgly and Lewis, of the Mexican, as the persons who called at the jail and stated that they recognized one of the prisoners. He was unable to swear to the parties.

Charles Sumner. Saw Ridgly in court, either at the time the prisoners were arraigned, or when they were brought up to receive copies of the indictment against them. Ridgly was near the crier's desk, with a crowd round him, gesticulating much, and pointing with his finger. Heard him say "there's one!" (designating some person near the marshall). The prisoners had, at this time, left the court, and a party of mutineers had taken their place. Ridgly still continued pointing, and selected one of the mutineers, saying, "that's one, that's one." He appeared much excited.

Cross-examined. The prisoners were in the room when Ridgly first pointed. They were at the bar, and other persons were sitting beside the marshal. Ridgly was by the crier's box. When he pointed, he pointed in the same range as the bar. The crier's box is in the same range, or a little further back. Watched Ridgly's finger, and saw that he pointed away from the bar. Was conversing with another gentleman at the time I saw this.

James Benjamin. Saw Ridgly in court the first day the prisoners were brought in. I was talking with Mr. Sumner. Saw Ridgly making himself very conspicuous. Thought I was one of the crew of the Mexican. Was a long time before I could understand what he was saying, and when I did so, the prisoners now present had left the court. Saw Ridgly point to one of a party of mutineers, who were then sitting in front of the bar, and say, "I see you! You don't know me now, d——n you, but you will know me soon." Can't remember the exact words used by Ridgly, but believe they were the above. Supposed him then to be a witness in the case of the mutineers, and immediately left the court.

Stephen Badlam. Had had a conversation with Joseph Perez, the government witness. About the 1st of October last, was requested by the District Attorney to accompany him to the jail for the purpose of interpreting between him and the prisoners. I and the District Attorney went into a room under the court, and directed the turnkey to bring in Perez. This was done, and I then stated to the prisoner that the gentlemen present, Mr. Dunlap, was the Attorney for the District, and had called, as the time of trial was approaching, to have some conversation with him. When I told Perez this he declared that "all he had previously said was false; that he had had a good deal of wine given to him, and had been told that if he became a witness, he would not be considered in the light of the other prisoners, but be kept as a witness." He, by this time, appeared much out of humor, and said rapidly, as if in a passion, "I will not be a witness any longer, but will take my chance with the others." I think he said that "the English had de-

ceived him, by telling him that he would not be kept a prisoner, while, in reality, he was now as much a prisoner as the others." I think, when he said this, he did not refer to any individuals in this country, but to the English. I told Mr. Dunlap what the prisoner had said, and Mr. Dunlap replied, "Very well, he may do as he pleases; if he does not like to be a witness, we can do without him." Perez then cooled down, did not appear in such a passion as previously, and said that "when he went before the judge, he would tell the whole truth."

Mr. Dunlap (sworn). I shall be happy to state anything within my knowledge in relation to this matter; indeed, I consider such a course a duty. After having had, with Perez, the conversation just alluded to by Mr. Badlam, and having noticed the state of his [Perez's] mind, I did not think it safe to leave the case for the government in its then state. I had, therefore, caused Nicola Costa to be brought in, and after telling him that he was under no obligation to state anything, and that all I [the District Attorney] could promise him was, that nothing he might say should be used against him, asked if he was willing to become a witness for the United States. The prisoner's reply was, "that they were all innocent, and that no robbery had ever been committed by them upon the Mexican." I then called in Domingo de Guzman, and afterwards Antonio Ferrer [the black cook], but found them both in the same story as Costa. As a last resort, I then sent for Bernardo de Soto, the mate, but succeeded as ill with him as with the others. I was influenced in sending for Costa and de Guzman, by considerations as to their youth; as regarded the black, by compassion for his ignorance and degraded condition; and I selected de Soto in consequence of his having performed the act of humanity which has been alluded to.

Mr. Child said the District Attorney had been influenced, in this affair, by the honorable feelings he supposed him to possess, and begged him to accept sincere thanks for the course pursued.

Mr. Dunlap said that when the offer of becoming a witness was made to de Soto, the later returned, for answer, that he was willing to testify, but could only do so to his own innocence. He thought de Soto answered evasively, and, therefore, immediately ceased conversing with him.

E. G. Prescott. Was in court when the prisoners were brought up to receive their indictments. Saw Ridgly upon that occasion. I was standing in front of the crier's desk. Some one pushed against me; saw it was the black. Asked him what he did inside the bar, when he replied "that he was one of the crew of the Mexican, and wanted to look at the d——d rascals and see if he knew any of them." Made way for him, and asked him several questions. He pointed out several of the prisoners, and afterwards shook his fist at them, saying, in a loud tone, "d——n you,

it's my turn now." He was in a state of excitement.

Ebenezer Prescott. Am an officer of the court; Ridgly was intoxicated at the time. Saw Mr. Sumner and others talking to him a short time after, and not thinking it proper that he should be questioned in his then state, went and told Mr. Dunlap.

Henry Homer. Ridgly was one-half or two-thirds drunk. Saw many people round him; among others, Mr. Child, who was listening and speaking to him. Heard one of the bystanders say to Mr. Child, "It won't do you any good, for he is pointing to the prisoners." Ridgly did not point to the mutineers.

James Benjamin (recalled). Ridgly did point, at first, to the prisoners, but afterwards at the mutineers. Some one standing by corrected him, telling him that "he was mistaken; the prisoners had gone out." Am certain prisoners had gone out at this time. Went away with the impression that Ridgly was a witness against the mutineers.

November 19.

Daniel F. Hale. Was a passenger, in the year 1831, on board the American ship Minerva, from New York to New Orleans. The Minerva ran aground on the Bahama bank, and would, in all probability, with all her crew and passengers, but for the exertions of Bernardo de Soto, the captain of a Spanish brig, which providentially hove in sight, took them on board, and carried them safely into the Havana. They were seventy-two in all. They could not possibly have been saved, had they not been assisted by de Soto, as the Minerva had a cargo of lime, which would have taken fire on coming in contact with the water, and the vessel had already sprung a leak. An American ship, the Chariot, after having ascertained their situation, continued their voyage without attempting to succor them; on her arrival she reported a vessel on the Bahama bank. De Soto treated them very kindly while on board his brig.

Samuel Sanford. Have examined the invoice of the cargo with which the Panda sailed from Havana, and value it at $10,000.

Mr. Child produced a Lloyd's List of 12th August, 1832, which stated that a piratical schooner, having on board thirty men, had been seen in lat. 30 long. 22.

MR. HILLIARD FOR THE PRISONERS.

Mr. Hilliard. Gentlemen of the jury: You are called upon today to exercise your vocation in a case of the most peculiar nature; in a case, a parallel to which we should seek for in vain in the criminal annals of this, and I almost said, in those of any other state or country. It is a serious thing, gentlemen, to sit in judgment, for life or death, upon a single individual. The performance of such a duty requires the

most unclouded state of the understanding, the most unwearied attention to facts, and the strictest self-examination, lest, through rashness, inadvertency, or prejudice, we pass sentence upon the innocent, and commit a judicial murder. If these considerations are of importance in relation to a solitary individual, how much greater must be their importance in the present case. You are not now called upon to decide the fate of one, but of twelve persons. The lives of twelve men are in your hands. By your verdict will be determined whether the individuals who now sit before you, in the fullness of life and strength, continue to exist, or whether they shall taste the bitterness of death—the ignominious death of the gallows. This court now presents the extraordinary spectacle of a number of prisoners tallying precisely with that of the jurors. They are opposed to you, as it were, man for man, and your verdict will decide individually and collectively their fate.

Under these circumstances, gentlemen, it becomes you to approach this trial with something like a religious consciousness of the imperfections of our nature, and our liability to error; it becomes you also to lay aside every thing that may have a tendency to darken your understandings, or obscure the day light of truth. The men before you have a host of prejudices to encounter. Notwithstanding the just and benevolent maxim of the law, "that every man shall be held innocent till proven to be guilty," we are too apt to believe an individual criminal merely because he is accused. No sooner do we see him here than we discern the mark of Cain upon his forehead. Men are frequently tried under circumstances only slightly presumptive of their guilt, but the simple fact of their being brought up for trial, too often pleads more strongly against them, than the most eloquent prosecuting officer. And this feeling operates against a prisoner, exactly in accordance with the magnitude of the crime of which he is accused. In cases of robbery, or larceny, the evil is not great; but let him be charged with murder, and the case is widely different. The imagination then plays us tricks; gives

to the countenance and eye of the prisoner a new expression. We see guilt written in every lineament of his visage, and translate the look of conscious innocence into ruffian hardihood, or callous indifference.

These men, gentlemen, are accused of the crime of piracy, and are consequently viewed with horror as robbers and murderers. Let me entreat you to lay aside all prepossessions of this kind and not suppose, because the prisoners are accused, that they are guilty. There is not a man perhaps who has looked upon these individuals, but has said in his heart, "Why, they can't be innocent; what hardened villains they are." And doubtless, if a phenologist had examined them, he would have decided them to possess the bumps indicative of these propensities, which have filled the world with violence and blood. I venture, however, to say that the men before you differ only in the color of their skins, from the most respectable crew that ever sailed out of the port of Boston. Prejudices exist, too, in relation to the place from which they come. We are too apt to suppose the Havana a mere nest of pirates, and to believe that the same sun which, in some countries, so speedily ripens and brings to perfection the productions of the vegetable world, induces similar precocity and redundancy of crime.

Even Spain, with its romantic associations, has but a sorry reputation among us; our imagination usually paints a Spanish sailor with the bloody knife in his hand. And yet we have heard this day related a striking instance of Spanish humanity. A vessel, in circumstances of extreme peril, lay aground on the Bahama bank. Her crew and passengers (many of the latter women and children) awaited death from the two most opposite elements, fire and water. While in this situation, one our own ships, like the Levite and Priest in the Scriptures, passed by and left the sufferers unnoticed. But another man, like the good Samaritan in the parable to which I have alluded, saw and rescued them. And this man, was he a Yankee? an American? No! he was a Spaniard! and his name was Bernardo De Soto!

Consider the circumstances under which the prisoners have come to this country. They have been brought here with a sort of eclat, much to their disadvantage. A vast apparatus seems to have been put in motion against them. England, the queen of the ocean, has stretched forth her arm against them, and every man, from the Lords of the Admiralty down to the youngest midshipman on board the Curlew, seems to have decided upon their fate. We are too likely to be influenced by these circumstances, and imagine that England would not have taken so much trouble; would not have sent the Savage, with Lieut. Loney, to this country, unless the prisoners had been guilty. It is but courtesy, it would appear, to hang them after all this; blood seemed necessary to cement the bond of union between the two nations.

I beg that it may not be supposed, however, that in speaking thus, I have any intention of reflecting upon England, or the English navy. Those who had lived in the days of Collingwood and Nelson could never have aught but respectful feelings in relation to the latter (the navy), and with respect to the former (England), despite her scribblers, I believe that there exists among the respectable class of people in this country a deeply rooted feeling of regard for their fatherland. Knowing that this feeling of respect and regard exists in favor of England, I am desirous of cautioning the jury on this head, as she (England) has been the principal agent in this matter.

The manner in which the defense has been managed, also requires some explanation. The long and tedious examinations which have taken place, were not agreeable to us (the counsel), and would not have been persisted in, could we have had evidence of our own. But have not this evidence; we are like a naked and unarmed man opposed to a full armed man. We had first to wrest from our adversary his weapons, and then fight him. All we could do was to endeavor to find out chasms in the government evidence. We were obliged to try it as sailors did a chain cable, first by extreme pressure upon every inch, and then by ringing it to see

if it was sound. And we would have failed in our duty had we not done this. Had we not acted thus, and had the prisoners been convicted, that conviction would have been a thing we never could have got over. The forms and countenances of these men would have dogged our noon-days steps, haunted our midnight slumbers, and we never again should have known peace.

If the individuals before you gentlemen are innocent, is there not something in their condition calculated to touch the heart? They are here, after a long confinement, with scarcely a rag or scrap of testimony in their favor.

They are in a foreign country, far from their friends, and now on trial for their lives, before a court to whose forms and language they are strangers. They are sailors, who do not understand forms. They have not even the advantage of the law which says the accused shall be confronted with their accusers. Their accusers are far distant. I have said, too, that they do not understand our language; such is the case. The very words I am now using, fall, it is true, upon their ears, but they awaken no corresponding feelings in their souls. I look in vain for that in their countenances which to an advocate is at once his strongest stimulant, and his best reward.

Mr. Hilliard entered upon the facts of the case and into a review of the evidence adduced by the government. He said the government was bound to prove that a piracy had been committed by the prisoners, singly and individually. In adverting to the testimony of the Captain and crew of the Mexican, he remarked that such evidence was always to be received with suspicion. Sailors were creatures of feeling, and when under the influence of revenge, or any other exciting cause, they would go a great way. They did not reflect, but felt. There were remarkable instances of this. One was to be found in the case of Capt. Toby, and the other in that of Otis. In both cases the crew swore falsely.

The COURT objected to Mr. Hilliard's allusion to Otis, saying that that one had not been disposed of. A reprieve had

been granted to Otis only for the purpose of affording time to the Executive to receive information from the court.

Mr. Hilliard. Some of the prisoners had been identified by the crew of the Mexican. Now it was well known, that no evidence was so liable to objection as that relating to identity. Nothing changed more than the human countenance when exposed to the influence of a tropical sun or strong excitement. The records of the courts proved this. The captain thought he recollected a dead man (Delgardo) one of those who held their knives to his throat in the cabin. It seemed to him (Mr. H.) that if the captain could identify any one, it would be more likely to be one of those who came with him in the boat, in the open sea, when his mind was undisturbed, than one of those who assaulted him in the cabin, where the light was necessarily in some degree obscured. The captain could give no description of their dress; in fact he identified nothing. But it was different with the mate; he never forgot any thing; he said he could remember all the messmates he had ever seen or known; and that having once seen a face, he never forgot it. Yet, in spite of this, he recollected nothing of the dress of the individuals who boarded the Mexican, except that one man had cowhide shoes, and of these shoes he told the binding. Was it possible a man could be so minute in his observation as to be able to tell the binding of a pair of shoes, and yet not be able to particularize any other article of dress? Not be able to tell something about the jackets, etc., of the other men?

Mr. Hilliard then went on to allude to the great similarity in the appearance of Spanish sailors, their universal swarthy complexions, etc.; to the evidence of the boy Battis, who when on board the brig Savage, at Salem, although he said he at that time recognized two of the prisoners, never mentioned the circumstances to any of the numerous friends and companions who were about him; to the improbability of the cook of the Mexican (Ridgely) being able to distinguish the scars on the face of Ferrer, the cook of the schooner, whom the former stated he saw on the fore-top-gallant yard; to the

fact that Perez had since stated that he (cook) was not there at all; to the little weight to be attached to the tesimony of Perez [Mr. H. referred to Perez's statements to Mr. Badlam in the gaol, where he (Perez) declared "that all he had previously said was a lie"]; to the many inconsistencies in Perez's evidence, and that of other witnesses; and finally to the circumstance of all the crew having identified Boyga as having been on board the Mexican, while Perez stated that Boyga did not go on board at all.

Mr. Hilliard also adverted to the conduct of Ridgely, when the prisoners were brought into Court to be arraigned, and then took an entirely different ground of defense. Supposing, he said, what he himself did not believe to be the case, that the crew of the Panda robbed the Mexican, it remained to fix the relative degrees of guilt of the prisoners. He contended that the Panda had been fitted out for a slaving voyage, for which alone, doubtless, many of the crew had shipped; and that if she had robbed the Mexican, only those who had been engaged in the robbery could be punished for it.

He supposed the case, that the captain, when a few days out, on the voyage to Africa, had yielded to the temptation and committed the act of piracy charged upon him, would it be just to punish more than himself and the men who immediately aided and assisted him in the act? It was necessary for the government to prove intention on the part of the others, when they sailed from Havana. Would they punish, for example, the cook, in the galley of the schooner, the cabin boy, setting his table in the cabin, or Perez, who had been sent aloft to look out, and could not come down again without transgressing the rules of the vessel?

If, gentlemen, said he, you deem with me, that the crew of the Panda (supposing her to have robbed the Mexican) were merely servants of the captain, you cannot convict them. But if you do not agree with me, then all that remains for me to do is to address a few words to you in the way of mercy. It does not seem to me that the good of society requires the death of all these men, the sacrifice of such a hecatomb of human

victims, or that the sword of the law should fall till it is clogged with massacre. Antonio Ferrer is plainly but a servant. He is set down as a free black in the ship's papers, but that is no proof that he is free. Were he a slave, he would in all probability be represented as free, and this for obvious reasons. He is in all probability a slave, and a native African, as the tattooing on his face proves beyond a doubt. At any rate, he is but a servant. Now will you make misfortune pay the penalty of guilt? Do not, I entreat you, lightly condemn this man to death. Do not throw him in to make up the dozen. The regard for human life is one of the most prominent proofs of a civilized state of society. The Sultan of Turkey may place women in sacks and throw them into the Bosphorus, without exciting more than an hour's additional conversation at Constantinople. But in our country it is different. You well remember the excitement produced by the abduction and death of a single individual; the convulsion which ensued, the effect of which will long be felt in our political institutions. You will ever find that the more a nation becomes civilized, the greater becomes the regard for human life. There is in the eye, the form, and heaven-directed countenance of man, something holy, that forbids he should be rudely touched.

The instinct of life is great. The light of the sun, even in chains, is pleasant; and life, though supported but by the damp exhalations of a dungeon, is desirable. Often, too, we cling with added tenacity to life in proportion as we are deprived of all that makes existence to be coveted.

> "The weariest and most loathed worldly life,
> That age, ache, penury and imprisonment
> Can lay on Nature, is a Paradise
> To that we fear of Death."

Death is a fearful thing. The mere mention of it sometimes blanches the cheek, and sends the fearful blood to the heart. It is a solemn thing to break into the "bloody house of life." Do not, because this man is but an African, imagine that his existence is valueless. He is no drift weed on

the ocean of life. There are in his bosom the same social sympathies that animate our own. He has nerves to feel pain, and a heart to throb with human affections, even as you have. His life, to establish the law, or to further the ends of justice, is not required. Taken, it is to us of no value; given to him, it is above the price of rubies.

And Costa, the cabin boy, only fifteen years of age when this crime was committed—shall he die? Shall the sword fall upon his neck? Some of you are advanced in years—you may have children. Suppose the news had reached you that your son was under trial for his life, in a foreign country (and every cabin boy who leaves this port may be placed in the situation of this prisoner), suppose you were told that he had been executed, because his captain and officers had violated the laws of a distant land; what would be your feelings? I cannot tell, but I believe the feelings of all of you would be the same, and that you would exclaim, with the Hebrew, "My son! my son! would to God I had died for thee." This boy has a father; let the form of that father rise up before you and plead in your hearts for his offspring. Perhaps he has a mother, and a home. Think of the lengthened shadow that must have been cast over that home by his absence. Think of his mother, during those hours of wretchedness, when she has felt hope darkening into disappointment, next into anxiety, and from anxiety into despair. How often may she have stretched forth her hands in supplication and asked even the winds of heaven to bring her tidings of him who was away? Let the supplications of that mother touch your hearts, and shield their object from the law.

I have thus endeavored to impress upon you that you are not to judge of these men in a mass. Condemn not, I beseech you, a single one of them, unless you see upon his hands the red spot of guilt. It is my interest, as a member of society, as much as it is yours, that the guilty should be punished. Where the sin lies, there let the axe fall; but be sure that the crime has been committed ere you inflict the penalty. You never can be called to perform a more serious duty than the

present. The time will come when this world will be as nothing to you: when its opinions, its struggles, and its varied interests will hold no more place in your thoughts than last year's clouds; when memory invested with preternatural power will array before your mental gaze every action of your past lives. Then, gentlemen, at that awful moment, believe me, this verdict will not be forgotten; and if you have given it without due conviction of its justice, it will lie with the weight of mountains upon your souls. Let me conjure you, then, as you revere the majesty of truth; let me entreat you, as you venerate that Being in whose presence you must one day stand, to come to this trial with minds "swept and garnished." Judge by the law and the facts before you; grant nothing to prejudice; let no bias warp your minds. I do not ask you to give a verdict in behalf of the prisoners, but in behalf of truth. Such a verdict as, in the closing scenes of this mortal existence, will inflict no convulsive spasms of remorse upon your souls.

November 20.

MR. CHILD FOR THE PRISONERS.

Mr. Child. Gentlemen of the jury: Any question which involves the life of a human being should be approached by those who were to decide his fate, with deep feelings of religious awe. How much ought those feelings to operate on the present occasion! The jury are called upon to decide a case of as much consequence as any ever decided by twelve men, since the institution of this form of trial. They are placed in a situation most awfully responsible. They are made the vicegerents of God, and the lives and destines of twelve fellow beings, twelve of the sons of God were placed at their disposal. By their decision these persons might be made to suffer, not only the pangs of the parting of soul and body, but that in a manner of all others the most revolting. They had here before them a most extraordinary spectacle. One of these very persons before them, now arraigned for life or death, had once saved the lives of those who made this

prosecution. Yes! the English officer by whom they were captured was once indebted for his life to the leader of these men. Mr. Quentin on the stand had stated he had no doubt that when Capt. Trotter was in the hands of the negro king he was saved by the interposition of Capt. Gibert. The jury could find nothing in the whole course of the trial that went to show that these men were the dangerous and bloodthirsty miscreants set forth in the charges brought against them. They (the jury) had been told there was much blood shed, and many slaughtered on both sides, at their capture. Was not this a total misrepresentation?

Perez stated that he could not read or write, when it was proved on the stand that he could do the former. Here was a manifest falsehood. When asked to write, also, what was his conduct? Notwithstanding he said he could not write he handled his pen in the most clerkly manner, and with as much grace as the most experienced writers in this city. This document, which I hold in my hand, though not a finished piece of chirography, yet evinces some of the first elements of letters, so well drawn, and so smoothly cut, that I think had we pressed the matter we might have obtained from him a very beautiful and satisfactory specimen of writing. I will now call your attention to some inconsistencies in his testimony relating to himself. He states that he could not recollect what was done at Nazareth, because he was so frightened at the idea of being made a prisoner; while in another part of his evidence he tells you he was once carried a prisoner into Havana, and gives as a reason, "because they had slaves on board the vessel." Gentlemen, I do not state this as having any bearing on the case, but only to show you how such testimony ought to bear.

This witness has also stated that upon one occasion when Capt. Gibert saw an English frigate, he (Capt. G.) ordered all the knives to be taken away from the crew and concealed, yet says, in the course of his testimony that it is the custom for all Spanish sailors to carry long knives. How can you reconcile all these opposing statements. It appears evident

to me that the whole aim of Perez was to give a deeper hue to the crime with which these prisoners were charged. The carrying of knives by Spanish sailors could excite no suspicion in the breast of any one, if it was a customary thing. We cannot account for such evidence in any other way than by believing that he feared, should these men be discharged that his own imprisonment might be protracted. Perez also tells you, gentlemen, that the carpenter stove the American boat with something heavy, like a piece of wood; and afterwards he states that it was done with an axe, which was carried on board to scuttle the brig with. Now, is not such an instrument as an axe wholly unfit for such a purpose as the scuttling of a vessel? Again, this witness tells you he does not know who shut the men below on board the brig, and yet he tells you he could see the padlock with which the scuttle was fastened, but does not know who shut it down. And Capt. Butman in his printed statement says that the scuttle never was shut. On another occasion he tells you he was aloft to see all that was done on board the Mexican, and afterwards gives this as a reason for not seeing any thing. He also says, that when in the top he could not see what shoes the boatswain were; yet he could plainly see a padlock on board the Mexican. [The COURT here remarked that Perez said he could not see the padlock, but was told about it by others. This was also confirmed by *Mr. Peyton,* the interpreter, who was present.]

Mr. Child. Perez also gives the distance of the two vessels as the reason for not recognizing any of the crew of the Mexican. Is not this wholly inconsistent with his opposite statements? How does he account to you for having been confined in the top so long? He tells you he was put there for a punishment. This was a curious mode of punishment. A person under punishment sent aloft to look out and give notice of the approach of any vessel which might perchance surprise them while in the commission of a daring robbery! Why, how easily might he have betrayed them? I think you

will be convinced, on a moment's reflection that this could not have been the case.

I may have trespassed in my cross-examination, gentlemen, upon your patience; I may have been more minute in minor particulars than prudence would seem to dictate; if we had been possessed of any other resort this would not have been the case. But, as it was, we could obtain not a ray of light, excepting by the strictest scrutiny and closest examination. Perez tells you at first that the men on board wore both black and white shoes; and afterwards, that he saw no black shoes on board, and, still farther, that the officers wore black shoes. Again, he says that the boatswain was a poor man and could not afford to wear a jacket; and afterwards he tells you that the boatswain had a black monkey jacket. How can you reconcile statements given in testimony so directly contrary in point of fact? Why, this witness seems to me to think it a luxury to lie; yes, he seems to luxuriate in these equivocal statements and falsehoods. I do not think we can account for his conduct in any other way, unless, indeed, he be insane; and if that is the case; if this poor, unfortunate individual is suffering under the visitation of God, whereby he is deprived of reason, then that is a sufficient reason for rejecting his whole testimony.

We next come to the division of the money, concerning which this witness informs you there was no rule of principle adopted. Now, I would ask, if it is probable that men would act thus carelessly respecting the darling object of their souls; to obtain which they had forfeited their honor, their reputation and their very lives? The money, says Perez, was found in bags like velvet. How does this agree with another of his statements, that the bags were made of dark, coarse linen? He also tells you that he is but twenty-two years of age; and the next moment states that he was a cabin boy during the wars of Morillo.

And I call your attention to the statements made by Perez in relation to the confessions at Fernando Po, and upon

the probability of his having perjured himself by the suppression of important truths.

I will now call your attention to another class of this witness' testimony. He has stated that the carpenter put fire to a bag of powder in the hold. Would the witness himself be willing to try this experiment? Would the carpenter have succeeded in such an attempt, and made his escape to the shore in safety? Is it not more probable he would have been in another world before reaching his boat? But he (the witness) has stated to you subsequently that he is not positive it was a bag, "that the powder was in a keg or a bag."

Remember the many contradictory statements which have been made by Perez in relation to the removal of the eleven thousand dollars at Nazareth, the attack on the English corvette by the schooner, and the money sent by Capt. G. to the second mate after the latter had absconded. Think of the probability that the division of money on the coast, mentioned by Perez was nothing more than the payment of wages to the crew, and it was very doubtful that a false log-book had ever been made by the mate. If such a log-book had been made, why had it never been presented by the prisoners to prove their innocence of the crime with which they were charged?

Compare the evidence of Perez with that of the other witnesses, and remember that it is easier for witnesses to adhere to one falsehood, than for a number of witnesses to adhere to one course of evidence without detection. Here, I would advert for a moment to the difference between the statements of Perez and those of Capt. Butman. The former has told you that at the time of the capture of the Mexican a musket shot was fired from the Panda; while the latter tells you "that the schooner gave chase, fired a gun to leeward and hoisted patriot colors." And, in connection with this matter, the district attorney asked, was the gun shotted?

I next called attention to the statement made by Capt. Butman in his log-book, that there were 60 or 70 men on board the schooner, and that she had two brass ten-pounders; while Perez said there were but 30 men on board, and both he and

the other witness, Quentin, affirmed positively that the guns were iron. Perez also said there was but one man and the third mate on board the Panda who spoke English, and that the former of the two did not go on board the Mexican; while the crew of the last named vessel declared that several of the pirates spoke English fluently.

The conduct also of Capt. Trotter did not show that he considered the prisoners pirates. He never kept them in chains long enough to keep up the farce, if it was a farce, and even employed Capt. Gibert as his amenuensis, regaling him with wine, and treating him in every way as a companion.

And why was there no announcement made in England of the arrival of these prisoners, or of the tragical death of the officers blown up in the schooner at Nazareth? Why, too, were they not tried in England for driving so hard a bargain with the English corvette, in the purchase of her spars?

It has just occurred to me, gentlemen, and I think the statement made by Domingo is worthy of your serious consideration, that Capt. Trotter ever after the capture of the Panda was subject to sudden fits of illness, etc., from which he had not recovered when the Curlew arrived in England. This, gentlemen, whatever effect it may have on your minds, has given me many serious reflections.

In reference to the consul at Plymouth, it is my opinion that if that consul had been a Spaniard and indifferent to Capt. Trotter, instead of being an Englishman and his friend, he would have demanded a trial of the prisoners in England, for the alleged robbery of the English corvette.

November 21.

Mr. Child. The capture of the Panda doubtless had not been effected without great loss and bloodshed on both sides, and no announcement had been made of this, on the arrival of the Curlew in England. I put it to the jury whether these were the common actions of men.

Mr. Child here wished to read some extracts from "Cob-

bett's Parliamentary Tables," by which he said he could show what kind of men had found their way into the British navy. He could show the names of upwards of 3000 lieutenants, many of them veterans in the service, who had been superseded by beardless youths.

The COURT said that any established work of science could be quoted in evidence, but the mere opinions of a writer, relative to the conduct of a government, or of individuals, could not be admitted.

Mr. Child. Had an announcement been made of the loss of life consequent upon the capture of the Panda, a court of inquiry would have been held upon the subject. But no announcement had been made. There is also the probability of Capt. Trotter having yielded in some way to the influence of corruption. Bacon, one of the greatest men that England ever produced, had taken a bribe of one thousand pounds, and why might not a similar course be pursued by Capt. Trotter? Could we bring some men before us who were at Prince's Island at the same time with the schooner, I think we could prove to you that the Panda was there searched by British officers, and declared not to be the one which committed the robbery.

Mr. Dunlap begged Mr. Child to suppress any further remarks on this subject, or he should be obliged to disclose some facts that would prove fatal to the prisoners. He said he possessed evidence to show that an American vessel arrived at Prince's Island about May, 1833, bringing intelligence of the robbery; and that upon the intelligence becoming known, the Panda immediately fled.

Mr. Child. Mr. Quentin had testified that a seaman named Turnbull took the match from a bag of powder in the Panda's magazine. In connection with this statement I wish the jury to bear in mind that this same man had been disrated in the British service. And here I would ask, why, if this money was left on the coast of Africa, has it never been traced? You have been told, also, that dollars are not current on the coast of Africa. Such an assertion, I think you must know

is false, as all travelers positively assert, that Spanish dollars are current all over Africa. Their value, doubtless, differs in different parts of the coast, as the inhabitants may be found more or less in want of other articles. And the money was buried! How is it that it remains secreted to this very day, with a fleet of British vessels on the coast? How is it that it is still in possession of the natives, notwithstanding the powerful arms of the British navy, headed by Capt. Henry D. Trotter? Why, also, were not the watch, the wash-basin, and the dressing case, all of so much value, ever discovered?

Gentlemen, I never, in the whole course of my practice, heard of any thing which appeared so utterly moonshine, as these stories which have been told you. I do not say they are so—but they may be, for all we know to the contrary. Do you believe, gentlemen, that Capt. Trotter ever thought this money was taken piratically? It was said the money belonged to Mr. Peabody, and if so, would it not have been the interest of Capt. Trotter to have found it? He would have undoubtedly received a large reward on restoration to the owner, and also a reward from his government for having captured a pirate. Quentin tells you that he supposes the money was taken, and sent to the Treasury of the Navy. This you must be aware would never have been the case, but it would, as prize-money, have been divided among the crew. Proceeding on this point, gentlemen, I shall endeavor to show you, that a good and honest log-book was taken, with the other papers, from on board the Panda, and was either destroyed, or remains in the hands of Capt. Trotter.

Quentin also tells us of an American flag or ensign which was found on board the schooner. Why, I would ask, has it never been produced, as well as the many trifling articles taken from Capt. Gibert? These stories remind me of nothing so much as some old wives' legends, or tales of the nursery, about pots of money buried, or a treasure at the end of the rainbow. I put it to you, gentlemen, whether it would be consistent with your duty, to take the lives of twelve men on

such grounds as these. Gentlemen, there never was such a case of piracy since the beginning of time. And is it a fact that Quentin did not know that the log-book or any of the papers were missing? Doubtless all the books and papers fell into the same hands. I have no doubt that the log-book is now in the hands of the prosecutors. The schooner has ever been known as a two-topsail schooner; as such, she was known in August, 1832, in Havana, and also in Cadiz, in 1833. It is no crime to sail in a Baltimore clipper; if it were so, many of our most valued nautical men would, long ere this, have suffered on the scaffold. The question before you is, not whether the pirate was a clipper, but whether she fully answers the description given of the Panda.

Perez tells you there was no money on board the Panda. It appears quite improbable to me that he should know any thing about it. Are you convinced of the probability, that the captain and mate should set out on a journey like this, without a cent of money in their pockets? That you must believe Perez has perjured himself, is, I think, reduced to a certainty, by the evidence of Badlam. I think you must be also convinced that the schooner had money on board, and if so—if she had from two to five thousand dollars on board, that fact proves the voyage to have been an honest one. It has also been proved that the captain paid money to the men at Nazareth. This money was doubtless shipped for the voyage at Havana; and is it likely he would have discharged Silvera, with the assurance that he could no longer support him, if he (the captain) had possessed such a sum of money as he is said to have stolen from the Mexican? In cases of piracy I consider it just as important, in order to convict individuals of the crime, that the money should be produced, as that in case of murder, the body should be found. As regards the money found at Nazareth, you have no testimony in relation to that, but the testimony of Perez, and he in one place tells you that eleven thousand dollars were buried, and in another, that he is not certain of it.

Mr. Child argued at considerable length on the improba-

bility of the Panda falling in with the Mexican, and read to the jury a table of calculations, which he had made, for the purpose of showing that the schooner must have been greatly ahead of the brig at the time the robbery was committed.

With reference to the prisoners being engaged in the slave trade before that circumstance was suffered to operate against them, the Government should itself be certain that it came into court with clean hands. It was undeniable, that however objectionable this traffic might be to New Englanders, the whole country at present participated in it. So late even as 1833, a direct trade in slaves had been carried on on the Mississippi. The Constitution had also virtually given a license to this branch of traffic for twenty years; and although it had been since abolished, the English and Danes had had greatly the start of us, in that particular. Charles the Fifth, too, of Germany, had done more to stop the slave trade, and to ameliorate the condition of slaves, than had ever been done by the Federal Government since the period of its formation.

I urge strongly upon the jury that even if the officers of the Panda were guilty, you are not to convict the crew, unless participation and previous intention can be proved against them;—the king's crown, the judge's robe, or the marshal's truncheon do not become those elevated individuals half so much as mercy become you (the jury) upon the present occasion.

November 23.

Mr. Child read a statement to the court to the effect that a piratical schooner, answering the description of the Panda, but clearly not that vessel, had been seen in the latitude of Cape de Verds, and had chased and fired into the ship Caesar, bound to Demerara.

MR. DUNLAP FOR THE GOVERNMENT.

Mr. Dunlap. Gentlemen of the jury: It now becomes my duty, on the fourteenth day since the commencement of this trial, to address to you the closing argument for the prosecu-

tion. The labors of this case have been unexampled. We can find no parallel to them in the history of judicial proceedings of this country. None of us have as yet, however, broke down under them, although many times the body has been weary and the heart sick and faint. Still I do not know that these labors ought to be to us a subject of regret, when we consider the great importance of the case now to be decided. It is important, inasmuch as it involves the lives of twelve men, and the interests of public justice, not only in this, but in every other civilized country.

It is of consequence, not only to our own citizens, but to "all those who go down to the sea in ships," that, when removed from the protection of their friends and neighbors, they should yet be safe—protected by the moral influence of the law, spreading over the wide expanse of ocean, and extending from one continent to the other. When then, I say, you consider the momentous nature of this trial—that it is connected with the interests of every nautical people, I think I am justified in the remark that the labors of the cause ought not to be regretted. Not only should we dismiss from our minds all thoughts of the labor we have undergone, but every, the slightest, personal feeling, calculated to bias our minds, or impede the ends of justice. We should come to the decision of this case with pure hearts, and minds freed from all feeling of anger or irritation, however much the course pursued for the defense has been calculated to produce them. We should come bearing in mind the great maxim of the law, "That every person is presumed to be innocent until he is proved to be guilty," but with a resolution also, should the guilt of the individuals before us be proved, to do our duty. The prisoners have had a fair and noble trial. If they are far from their friends; if the forms of this court are new to them, yet have they had privileges, which in their own country they could not have had. They have been furnished with copies of the charges against them, in order that they might know what those charges were. They have had individuals acquainted with their own language to

instruct them in matters of right; they have had counsel of their own selection; they have had the privilege of choosing their own jury, from a large number of citizens collected from all parts of the vicinity (and if ever there was a mode more calculated to secure the proper administration of justice, it is that adopted by us in this particular); they have had the advantage of the purse of the government to procure any testimony within the process of the court; all witnesses whose testimony they desired are in attendance at the government expense; and they have had counsel to aid them, not only in relation to the law and the examination of witnesses, but also to urge all matters as well of testimony as of the law, to the jury. Have they not then had all the privileges which the mildest system of laws could extend to them? Had this case, which has already occupied the attention of this court twelve days, at an average of six or seven hours per day, been tried at the Old Bailey, it would have been decided between the rising and the setting of the sun. This is not all; besides the indulgences already stated, they have had the benefit of a most laborious, ingenious, and talented defense. The junior counsel, who opened this case, did it with ability and feeling; and presented, in my opinion, every point for the prisoners of which the case was susceptible. His address was decked with all the graces of a brilliant imagination; and with all the attractions of the most persuasive eloquence. But the most refined and elaborate texture of reasoning is too often like the most beautiful fabric of art, necessarily composed of the frailest materials. And if the defense be inconclusive to establish the innocence of the prisoners, I may remark (to use the words of Lord Bacon, on a similar occasion), that the fault is in the stuff, and not in the workman. The closing counsel brought to the cause his untiring zeal, his great industry, his various and profound learning; and exhibited a labor, and I had almost said a desperation, which I think must have satisfied you, gentlemen, that the cause pressed heavily on him, and that he was fully conscious of the weight of the load,—the dead lift,—he had undertaken to carry.

But, gentlemen, all the indulgences I have enumerated have been granted, not to facilitate the escape of guilt, but to afford protection to the innocent; else were our laws a mockery, and our courts of justice but a theatre, where the prize of eloquence is to be won, and where, instead of protection of the rights of our citizens, guilt might, more than in any other place, revel in crime, and defy discovery. . . . If the prisoners are innocent, none of you, gentlemen, I am sure, will regret the length of time, and the great labor which has attended this investigation; on the other hand, if they are guilty, and it shall become your solemn duty to render that verdict which will consign them to chains and the scaffold, will it not be a satisfaction to you, that you have heard all that could be said in their behalf; and that could enable them, if innocent, to prove that innocence. My duty in this case is plain. The counsel for the defense have had their duty to perform; and they have done it manfully. A duty has also been assigned to me. I have given a pledge to my country, that if I possess any talents, those talents shall be exerted to the utmost in the discharge of my duty. I have taken an oath to this effect, and I must not be found recreant to that pledge,—unmindful of that oath. Yet you shall hear from me no rash expressions of anger against the prisoners. It is not my duty to excite prejudices against them; but calmly, and with a firm step, to progress through the mertis of this case.

In pursuing this course, I shall endeavor, as much as possible to simplify this transaction—to clear it from the mass of words, beneath which it has been, doubtless unintentionally, buried. After these introductory remarks, let us proceed at once to the facts of the case. There would be no doubt that the Mexican had been robbed in lat. 33, lon. 34½, by pirates; the great question was, whether the captain and crew of the Panda were the individuals who committed that robbery. Let us examine the evidence bearing upon this subject. There was a schooner named the Panda, in the harbor of Havana on the 12th of August, 1832. She sailed thence

on the 20th or 26th of August, commanded by Captain Gibert, and manned by a crew, part of whom were the prisoners at the bar. All this was undeniable; it was proved by the Custom House documents, and also by the testimony of Perez and Guzman. Perez says that she sailed on the 20th or 26th, and the ship's papers and Moro Pass, etc., being dated the 18th, all induce us to believe that the 20th August was the day on which she commenced her voyage. Now the track of the Mexican is before us, marked by the mate of that vessel till the day of the robbery. The Panda sailed on the 20th or 26th, from Havana, her track lies directly over the spot where the Mexican was met, and you have the testimony of Mr. Peabody, the owner of the vessel, now a merchant, but formerly a practical seaman, that the two vessels would be likely to meet. The next testimony upon this point is that of Mr. Briggs, who has been a captain for thirty-two years, and who informs you that the Panda would probably come as far north as 37 deg. and that she would be more likely to meet the Mexican in 33, 34½ than at any other point on the chart. We have, then, Capt. Rich, who says that the latitude just mentioned is the spot where the vessels would meet. He tells you that were he bound for the coast of Africa he should come north as far as Cape Hatteras. We then have Capt. Budd, an officer in the U. S. navy, who has commanded two sloops of war on the Havana station; he agrees with Capt. Rich and the line indicating the course of the Panda, which he traced with his finger on the chart, passed over the very place where the robbery was committed.

Consider also the evidence given by Capts. Bethune, Faulkner, Bacon, and Devens, to the same effect. Now we have witnesses from the Mexican, and one from the Panda herself, who swear that the prisoners are the persons who committed the robbery. What sort of a vessel was the Panda? She was a clipper schooner, with raking masts, painted black, with a white streak, and her armament consisted of two small guns and one large pivot gun. And what does Capt. Butman tell you? Why, that the piratical vessel was a clipper, painted

black, with a white streak, that she had two small guns, and something like a gun covered up amidships, and that she was about one hundred and fifty tons burthen. With respect to the latter item (the amount of tonnage) allowances must be made for the state of alarm into which Capt. Butman was thrown, and Mr. Peyton has told you how difficult a matter it is to judge of the tonnage of a vessel; he has told you that himself and messmates were, in one instance, unable to decide within fifty or sixty tons the amount of burthen even of the vessel in which they were sailing.

Then with regard to the schooner's armament. The Panda had two small guns, and one pivot gun. Perez said the small guns were six and nine pounders, and Mr. Quentin, a naval officer, made a similar mistake in his estimate of their calibre. Capt. Butman, however, described the guns as "neither long nor short," and a singular corroboration of his opinion has come out in the course of this investigation. In the roll of equipage of the Panda, read a few days ago, the small guns are represented as gunnades, and these pieces are, as Capt. Butman said, neither "long nor short guns." Is not this proof of Capt. Butman's accuracy, of far greater importance than the mistake which he made in relation to the metal of the guns? A mistake, too, very easily made; for who has seen guns at sea in the same state of brightness as those exhibited in a park of artillery? And who has not noticed the dark and bronze state of the guns which lie in our navy yard. Remember the perfect agreement which existed between the testimony of the crew of the Mexican and the witness Perez in relation to the colors of the Panda. Reed, the mate, stated that when the piratical vessel came up with them she hoisted patriot colors. And Perez says that when they fired a gun for the American brig to heave to, they hoisted the Columbian flag. The description given by Capt. Butman of the manœuvres of the piratical vessel at the time of the Mexican's capture, also correspond with Perez's account of the movements of the Panda at the same period. There are also numerous other coincidences between the testimony of the crew of the

Mexican and that given by Perez. The mate of the Mexican says that the pirates took from them some spars, butter and fowls, and Perez makes the same statements from his observation while in the maintop of the schooner. He also says that he saw smoke proceeding from the galley of the Mexican, and Capt. Butman tells you that his vessel was attempted to be set on fire. You have also the coincidence from the witnesses in both vessels, that all this took place on the 20th September. Perez mentions the 20th, as the day on which the Panda captured the American brig, and the log-book of the Mexican tells you that she was robbed on that day. Well, the Panda proceeds on her voyage to the coast of Africa, and in a few days after the period of the robbery, changes her rig, with the spars and duck taken from the Mexican; she also changes her paint. On her arrival at her destination she stays a short time in the river Nazareth, and then proceeds to Prince's Island, first removing her figure head and substituting an awkward piece of wood; and the next thing we hear of her is, that she has fled from Prince's Island, because the news of the robbery of the Mexican had reached that place. Her officers then propose running her on shore and destroying her. Now, why, if they had done nothing wrong, destroy their vessel? What was the burying of the money for either?—why put that into the care of the negroes? If they had brought it from the Havana with them, they would have kept it in its proper place, under the guns of their vessel. And if they were not pirates, what had they to fear from a cruiser of his Britannic Majesty's navy?

The English boats came up with the Union Jack hoisted; that flag which was the protection of honest men, but the terror of pirates—the flag of the queen of the ocean! But these men preferred to destroy their vessel and place themselves under the protection of the negroes, rather than submit to the search of a lawfully commissioned cruiser of the greatest naval power in the world. They had nothing to fear even on the score of their being slavers, because no vessel can be captured unless she have slaves on board, which the Panda had

not at the time she was taken. And what became of them after they left the vessel? Why they sought refuge among the negroes and in the forest. How different was the conduct of the Portuguese, who shipped at Prince's Island, and had no concern with the robbery. One of them went on board the Panda immediately after the English had taken possession of her, and the other sought a passage home in a vessel lying very near the Panda. From the instructions of the captain of the Panda, I believe the whole affair was a regular piratical and slaving speculation, on the part of certain individuals in the Havana, for the Panda had not a sufficient cargo to purchase the number of slaves (450) she was going for, and the wages of the crew also were $1000 per month. Mr. Peyton informed the court that slaves on the coast of Africa could be purchased for $12 each.

I shall now advert to the alleged contradictions in the evidence of Perez. The statement of this witness, "that he had not been drunk, and had not had rum given him," was not contradicted by the statement he made in gaol to Mr. Badlam. He told Mr. Badlam that on that occasion he had had wine given to him; but never acknowledged that he received rum, or that he had been drunk. The witness' state of mind, too, when he said this should be taken into consideration. He believed he had been dealt faithlessly with by the government, and under this impression made use of words attributed to him. At the conclusion of the interview, however, he stated that "when before the judge he would tell the truth," thus clearly intimating that his previous statement about the wine was a falsehood. In relation to Perez's declaration, that he could not read or write, he had used the words in their common acceptation and meant to say that he could not read as others did, with any degree of fluency.

If Perez had declared he could read and had given no better specimen than he did in the court (reading or rather spelling two lines in five minutes) the counsel for the prisoners could have accused him of laying claim to a qualification which he did not possess. But, even admitting that Perez had

said previously that he could not read, and that in contradiction of that assertion he did read in court, this circumstance would be one of the strongest proofs that he had testified truly. It would prove that however bad he was in other respects, whatever falsehoods he might have stated elsewhere, he had come into court upon the present occasion with a full knowledge of his precarious situation; with the conviction that his life depended upon his veracity; and with a determination to tell the truth, even should he contradict any thing he might have previously stated. How easy would it have been for him, when asked by the counsel for the defense "if he could read," to have replied in the negative.

To proceed to the consideration of the question "whether the whole of the prisoners were implicated, supposing the captain and officers to be guilty." In relation to this question, there is one circumstance which removes all doubts that the whole crew were copartners in the crime; which extinguished at once in my bosom, the hope I had so fondly cherished in favor of Ferrer, the cook, and Costa, the cabin boy. This damning circumstance is the fact that not a single individual of the crew had ever mentioned the robbery to the Portuguese, who were so many months their companions. This unnatural silence proved that they were all equally implicated in the crime and all felt the necessity of keeping the secret; that they had cast in their lot with their officers, and were bound together as a band of brothers, by a common sense of guilt and danger, the captain being like Byron's Conrad, the master-spirit of the whole—"one formed to lead the guilty, guilt's worst instrument."

The nautical gentlemen, who were brought forward by the counsel for the defense in numerous instances, although called in behalf of the prisoners, corroborated the evidence of the government witnesses. Almost all piracies are now committed by slavers, slavery being the only pretence on which a piratical vessel could now-a-days be fitted out. *Mr. Dunlap* concluded by passing an eloquent eulogium upon Capt. Trotter, and the English navy generally for the gal-

lantry with which they, upon all occasions, risked their lives in behalf of the general weal.

November 24.

JUDGE STORY'S CHARGE.

JUDGE STORY. Gentlemen: This important and protracted case is now, I hope, drawing to a close. As regards its duration and the extraordinary nature of the circumstances developed, it is without parallel in the history of our courts. Great diligence and exertion has been used to bring out facts; those facts are now before the jury, and it is for you to decide as to the guilt or innocence of the prisoners. The prisoners all pleaded not guilty, and I feel sure that in a case like this, I need not say much to the jury in relation to the necessity of using deliberation and caution in the formation of your judgment; on the one side, the lives of the prisoners are in your hands, and, on the other, the preservation of public justice. The lives of the prisoners are dear to them, and the due and fit administration of justice is not the less dear to the country. The case has been argued for the defense with great elaborateness, ingenuity and eloquence; and the reply of the district attorney is marked with equal diligence, moderation and candor. Little more remains, then, for the court but to sum up the facts, and present to the jury the most important elements contained in the testimony which has been adduced before them. I wish the jury to understand (the case having, as I said before, been argued so elaborately and in detail), that they are not to take the facts I give them as all the facts, but only as the most important ones. As the case, for the most part, turns on a question of fact, it is for the jury to decide upon it in that respect. The suggestions about to be made by me are only so made for the purpose of assisting you in coming to correct results; and if, in the course of the remarks I am to make, I should happen to differ in any way from you, to follow the dictates of your own minds and consciences, without being influenced by any observations or opinions expressed by me. You are to use your own judgment.

Many things, said JUDGE STORY, had been brought into the present case which he regretted; but the counsel for the defense had undoubtedly done right in omitting nothing that might have occurred to their minds as likely to be of benefit to the prisoners. The jury had had many cases read to them, to show the difficulty of deciding upon the identity of individuals. Some of these might be founded in fact, or they might, for aught any one could say to the contrary, be figments of the brain. They were the common-places of the law, and had been cited before him for the same purposes as now, in almost every criminal trial in which he had been engaged. If they went for any thing, they went to establish two things, viz.: first, that unless the body were found there ought to be no conviction; second, that, because men had testified falsely, or had been mistaken as to identity, that therefore testimony ought not to be taken. Now these positions were absurd. If no conviction ought to take place unless the body of a murdered person be found, what was to be done in cases of murder at sea, where the body was thrown overboard and buried beneath the broad ocean?

The cases of murder were numerous, and were they to be told that a jury had no right to convict, because the body could not be produced from the depths of the sea? Men had been convicted on false testimony; and what then? Are we to say that jurors shall never convict, because men have been found base and wicked enough to perjure themselves, for the purpose of taking away the life of a fellow being? No one, surely, will contend for doctrines of this kind. If they were admitted, our courts would be useless, not only in criminal but civil cases, and instead of being here today, the law ought to prescribe that there should be no courts, no administration of justice throughout our country. Human testimony is almost the only thing upon which we can rely in this world; and he who undertakes to shake our faith in it, undertakes to shake our faith in every thing on earth, and I had almost said, in heaven. Where would be the consolations of Christianity, which are based on human testimony? How

could we support our claims to property, or claims of any other kind, but by human testimony? The only purpose for which these cases ought ever to be called before a jury was in the way of caution; and if they were urged farther than this, it was an urging of the jury to betray their duty. He regretted to see them introduced into an American court, because our tribunals were not characterized by a thirst after blood; on the contrary, if we had any thing of which we could justly boast, it was that, in our code of laws, there were few capital crimes, and that the administration of that code was conducted with the severest and most punctilious caution. It had been objected to us that we were even over-merciful.

There was another topic on which he must say a few words, and that was the remarks which had been made in relation to the manner in which the prisoners had been brought here, and upon the circumstances of their capture. He should feel himself unworthy of the station he occupied, if he did not advert to this topic, because, if he rightly understood the prisoners' counsel, an attempt had been made to throw a great deal of doubt over the motives and actions of Capt. Trotter, and even of the British government itself, for having sent the case to this country. The British government, on this occasion, finding persons in England in custody of one of her own officers, and accused of piracy on an American vessel, chose to send those persons here, where the best evidence could be obtained, and where the greatest facilities and advantages for their trial were to be found. Over piracy, all nations exercise equal jurisdiction, and the British government might justly have exercised it in this case; but they preferred that the offenders should be tried by the citizens of that country against whom the offense had been committed. And I may say that this conduct of the British government can scarcely receive too much praise from an American citizen.

How could this cause have been decided in England. None of the crew of the Mexican, nor her owner, were there. How could the evidence heard before this court, and which occupied its attention during the three first days of the trial,

have been heard in England. Let them look, too, at the conduct of Capt. Trotter. He was an officer of the British navy, stationed on the coast of Africa, with directions to use his exertions in suppressing the slave trade. He was there discharging the particular duty which had been assigned to him, and was under no obligation to trouble himself about pirates. But he receives information of the robbery of the American brig, and that the pirate is supposed to be on the African coast, and immediately goes in quest of her. What motive could this gallant officer have had to interfere in this matter, but a sense of justice, and a desire to protect the rights of the whole world? He had nothing to gain, and he might encounter a great deal of peril, obloquy and responsibility. Under these circumstances Capt. Trotter does interfere. He goes in search of the pirate. And you know, gentlemen, said the learned judge, it was no ordinary peril he encountered. Mr. Quentin has stated facts sufficient to prove to you the danger of the undertaking, even when the crew of the Panda were not on board to make resistance. Had the crew remained on board, and used the means in their possession, the loss of lives among the British, they being in open boats, must necessarily have been great.

Now what inducement had Capt. Trotter to encounter all this, but a high sense of public duty, not merely to his own country, but to the commercial world. It is said that there was something mysterious about the conduct of this brave officer. I have never observed anything of the kind, gentlemen, during this trial. It remains for you to say whether anything of the kind exists. His station was on the African coast, and he could not leave it without orders from home.* He made the capture and communicated it, where he was in duty bound to do, to the heads of the admiralty. We know that he did this, because we find that the British government taking cognizance of his act, and sending the prisoners to be

* In allusion to the remarks of Mr. Child as to the length of Capt. Trotter's cruise and no announcement having been made in the papers of his capture.

tried here with reference to it. Suggestions had been thrown out, and questions asked, as to whether money had not been divided among the crew of the Curlew. This question no person could misunderstand for a moment. Now he must say, as an individual, that, on the most careful examination, he had found nothing as done by Capt. Trotter, that a man in his situation might not fairly do. The learned judge farther stated, in reference to this matter, that if, in this first instance of national reciprocity, British officers found themselves accused without sufficient reason, it would be, as it was the first, most assuredly the last time they would expose themselves to such consequences. It was, however, possible that Capt. Trotter might have acted with perfect propriety, and yet the prisoners be innocent of the crime imputed to them. On the other hand, Capt. Trotter might have done wrong, and the prisoners, notwithstanding, be guilty. The jury were to bear in mind that Capt. Trotter's conduct, was a matter separate from the guilt or innocence of the prisoners. With respect to the capture of the Esperanza, the rule of law was that a probable cause would justify taking possession of her; and if this could be proved, no damages could be recovered. Damages could only follow a wanton and manifestly improper seizure.

JUDGE STORY passed from this topic to the merits of the case between the government and the prisoners. He admonished the jury that if there remained a reasonable doubt in their minds, as to the guilt of the prisoners, they were to give them (the prisoners) the benefit of it. It must, however, be a reasonable, and not a vain and trifling doubt. The present case, he said, might be divided into three questions: first, Was the Mexican robbed? Secondly, was that robbery, if committed, committed by the Panda? Thirdly, If robbed by the Panda, were all the prisoners present implicated in the crime? With regard to the first question, there could be no doubt. No one attempted to deny that the Mexican was robbed in lat. 33, lon. 34½; and that, after the specie had been taken from her, her crew were placed below, and at-

tempted to be destroyed by fire. It was obvious that the individuals, whoever they were, after committing the robbery, had resolved upon consummating their crime by the sacrifice of every one of the crew, by the murder of those against whom they could have no angry feeling, and whom they had never before seen. It was a horrible crime; but the horror which it excited was not, at the present time, to weigh an atom against these prisoners, in the minds of the jury. They (the jury) were first to see if the prisoners were guilty.

JUDGE STORY then proceeded to the consideration of the remaining questions into which he had divided the case, viz.: Whether the Panda was the vessel that robbed the Mexican, and if she was, whether all the prisoners on board her were equally guilty?

He went over the whole of the evidence bearing upon the first point, and finally summed up in a manner that could not but have proved conclusive in the mind of every one as to the guilt of the prisoners. Upon the last question, however, he expressed himself decidely in their favor. Only those of the crew, he said, could be convicted, who were proved to have participated in the crime. The mere fact of their being on board the Panda was not sufficient to condemn them.

With reference to the good characters given by some of the witnesses of Capt. Gibert, the judge said that a good character certainly availed much, but numerous instances were on record of men, long held in high estimation, suddenly committing the greatest and most horrible crimes. With regard to De Soto, the generous act performed by that indvidual was fully estimated by every person in the court. I stand humbled before you, gentlemen, by a fact brought out in the course of the testimony you have heard; the fact of an American ship passing by and leaving American citizens to perish in sight of their countrymen. We have had from the counsel for the defense an eloquent allusion to the parable of the priest and the Levite, and never from the days of our Savior till now can that parable have been more fully illustrated than by the fact to which I have alluded. The

American passed by the sufferers, the Spaniard stopped and saved them. But the prisoner's guilt must outweigh all these considerations. We cannot dispense mercy. That is the attribute of a higher power. You and I, gentlemen, are bound to do our duty according to law, and we should be false to our oaths, our country and our God, if we were to shut our eyes to the force of the testimony before us.

The concluding part of the charge was very favorable to Portana, Velasquez and Ferrer. No participation whatever, JUDGE STORY remarked, was proved against Portana—the only circumstance against the second was the statement of Perez that he was with him (Perez) when the money was buried; and the third, Ferrer, was evidently a servant and an African. Although set down in the ship's papers as free, that fact was by no means conclusive. Vessels going on a slaving voyage would never carry a native African with them as a slave, because that circumstance would subject them to capture by the English or other cruisers. There was therefore every reason to believe that Ferrier, although described as a free black, was in reality a slave.

JUDGE STORY, in the course of his charge, made the following remarks in relation to the slave trade. This inhuman traffic, he said, had long been the reproach of Christendom. It had been carried on with as much zeal by England and America as by the French and Spanish. And although Christianity had blessed us with its light for 1800 years, it was only until very lately that this species of commerce had been wholly abolished. He could not agree in the remarks which had been made by both counsel for the defense, upon the conduct of the United States as connected with this matter. The Constitution had never sanctioned the slave trade. It met an existing state of things, and passed an act taxing the trade, and enabling Congress to prohibit it altogether at the expiration of 20 years. It did this in '88, and in 1806 a prospective act was passed to take effect in January, 1807, declaring the slave trade forever abolished in this country. He was not aware that the traffic had been carried on during the first 20

years by more than one or two of the Southern States. Congress could do no more than it did at the time of the formation of the Constitution. They wished to have prohibited the traffic at once, but there were opposing interests to be reunited, and they had no other alternative than to sacrifice the Constitution, or submit to a limited evil. They had many prejudices to overcome, and had they not secured the Constitution by a temporary sacrifice of their wishes, they never would have been able to have destroyed the slave trade at all. Let it be known, then, that America made the first step in this matter. She did what she could in '88, while England did not stir till years afterwards, and then, when Pitt and Wilberforce exerted themselves upon the subject, the bill which they introduced fell dead in the House of Commons. Even Pitt, the Prime Minister of England, with all his popularity, could not break down the prejudices of his countrymen, and nothing effectual was done in England till the year 1807, while in 1806, America, by the prospective act which she had passed, abolished the slave trade throughout all the States, thenceforth and forever. To America, then, is due the credit of having, while yet a child, and possessing but the elements of government, looked forward to the time when a traffic in her fellowmen should no longer disgrace her annals.

Nov. 25.

The Court assembled at 11 o'clock, and after the lapse of about half an hour the jury came in with their verdict.

The *Clerk.* Gentlemen of the jury, have you agreed upon your verdict?

The *Jury.* We have.

The *Clerk.* Who shall speak for you?

The *Jury.* Our foreman.

The *Prisoners* were directed severally to rise as soon as called and receive the verdict of the jury. The Captain, Pedro Gibert, was the first named. He arose, raised his hand, and regarded the jury with a firm countenance and steady eye.

The *Clerk.* Jurors look upon the prisoner; prisoner look upon the jurors. How say, you, gentlemen, is the prisoner at the bar, Pedro Gibert, guilty or not guilty.

The *Foreman. Guilty.*

The same verdict was pronounced against De Soto (the mate), Ruiz (the carpenter), Boyga, Castillo, Garcia and Montenegro. But Costa (the cabin boy), Ferrer (the negro), Guzman, Portana and Velasquez, were declared *Not Guilty.*

The *Foreman* read to the Court the following recommendation to mercy:

"The sympathies of the jury have been strongly moved in behalf of Bernardo De Soto, on account of his generous, noble and self-sacrificing conduct in saving the lives of more than 70 human beings, constituting the passengers and crew of the ship Minerva; and they desire that his case should be presented to the merciful consideration of the Government."

JUDGE STORY replied that the wish of the jury would certainly be complied with both by the Court and the prosecuting officer.

The acquitted prisoners, on motion of *Mr. Hilliard,* were directed to be discharged, upon which several of the others loudly and angrily expressed their dissatisfaction at the result of the trial. Castillo (a half-caste, with an extremely mild and pleasing countenance), pointed towards heaven, and called upon the Almighty to bear witness that he was innocent; Ruiz uttered some words with great vehemence; and Garcia said "all were in the same ship; and it was strange that some should be permitted to escape while others were punished." Most of them on leaving the court uttered some invective against "the picaro who had sworn their lives away."

On Costa, the cabin boy, being declared "Not Guilty" some degree of approbation was manifested by the audience, but instantly checked by the JUDGE, who directed the officers to take into custody every one expressing either assent or dissent.

The jury were discharged; the JUDGE thanking them for the great patience and attention they had exhibited throughout this painful trial, and hoping they would find, in the approbation of their fellow citizens, and in the testimony of their own consciences, that reward which always resulted from the performance of an act of duty.

The convicted prisoners were then sentenced to death.

THE EXECUTION.

"Delargo committed suicide in Salem Jail before the trial. . . . After the conviction, De Soto, the first mate, through the intercession of Mrs. David Lee Child, the wife of the counsel, was pardoned. A strong point in his favor was his bravery in rescuing a vessel in circumstances of great peril, with her crew and passengers of women and children, as she lay aground on the Bahama Banks. . . . The others were hanged at the Leverett Street Jail and many people came in boats to witness the execution, which I also saw. . . . Boyga cut his throat and was hanged sitting in a chair; Ruiz pretended to be insane, but soon it was decided that he was shamming and he was accordingly executed."[8]

[8] Willard's "Recollections." *Ante,* p. 701. Mr. Willard was also present at the Trial.

THE TRIAL OF THOMAS COOPER FOR SEDITIOUS LIBEL, PHILADELPHIA, PENNSYLVANIA, 1800.

THE NARRATIVE.

Thomas Cooper[a] was an Englishman, who had inherited a good fortune, had been bred to the bar, but had spent more time experimenting with acids and gases than in perusing law books or preparing briefs. From chemistry he

[a] COOPER, THOMAS. (1759-1840.) Born in London, England; educated at Oxford; studied law and then turned to the natural sciences, particularly chemistry, over which he soon obtained a mastery. But he went into politics and got into disfavor with the Government, which made him abandon public life for his chemical experiments, which, however, turned out disastrously, so he emigrated to America. Of his life after he had served his term in prison Dr. Wharton (State Trials, p. 680), says: "On coming out of prison, Mr. Cooper found the minority rapidly turning into a majority, and in a short time, the administration which had prosecuted him was overthrown. His untiring industry, his almost universal philosophical attainments, and his courageous temper, but more particularly the sufferings he had undergone in the maintenance of the freedom of the press, placed him high in the esteem of the dominant party. After having been appointed a commissioner to negotiate a settlement of the Luzerne difficulties in Pennsylvania —a duty he discharged with remarkable skill and success—he was nominated by Governor McKean to the president judgeship of a judicial district.

"Mr. Cooper's proceedings after he became the wielder of judicial power, form an odd sequel to his experience when he was its subject. Scarcely five years had passed after he was out of prison, before he was on the bench; and scarcely five years more had passed before he was impeached before the Senate of Pennsylvania, upon charges, which, were it not that they were gravely preferred and amply supported, might be considered burlesques of those upon which he was instrumental in impeaching Judge Chase, in the Senate of the United States. (See *post*, 11 Am. St. Tr.) He was charged with pouncing upon delinquent jurors on the first day of the court, with fines and bench warrants, in violation of the venerable Pennsylvania practice, of giving them the *quarto die post;* with imprisoning a Quaker for not pulling off his hat; with committing three parties for 'whispering,' an offense for which he declared he would hear no apology; with issuing warrants without

drifted to metaphysics, from metaphysics he passed to politics, and in politics made himself so unpopular in England that he emigrated to the United States. Here he began the practice of law, but, though an earnest Republican, a scholar and a man of unquestionable ability, his clients were few, and he found himself under the necessity of seeking a government place. In 1797 the office of agent for American claims under the English treaty was vacant. His friend Dr.

previous oath, and then committing the constables who refused to serve them; with insisting in one case in examining under oath, a prisoner charged with crime, as to his own guilt; with sending private notes to juries in criminal cases, tending to extract a verdict of guilty; with carting a Luzerne convict to the Philadelphia prison, a thing not then provided for, which ended in the convict being kept in abeyance by the Philadelphia jailer, who refused to receive him, and the court who refused to take him back, thereby, under this new ambulatory commitment, withdrawing the sheriff from his public duties; and with brow-beating counsel, witnesses and parties, in cases so numerous as to make their recapitulation cover three pages. The Presbyterian and Quaker professions, he was charged with declaring in open court, to be 'all damned hypocrisy and nonsense;' and divers specifications were given of illegal interference on his part in the profits of cases before him, and of private speculations in interests which were to pass under his adjudication. On Feb. 21, 1811, these charges having been formally laid before the Pennsylvania House of Representatives, were referred to a committee, who two days afterwards reported, that the evidence produced before them sufficiently substantiated the specifications of passionate and oppressive judicial bearing, leaving, however, the accusation of peculation without any further basis than that afforded by an imprudent purchase of certain property, sold at sheriff's sale under process from the court, a transaction which, though clear from any moral stain, the committee thought to be of doubtful propriety and dangerous precedent. They submitted, in conclusion, a resolution, 'that a committee be appointed to draft an address to the Governor for the removal of Thomas Cooper, Esq., from the office of President Judge of the eighth judicial district of Pennsylvania.' . . . The Governor removed him.

"Mr. Cooper's fine chemical acquirements, which, during all the storms of his eventful life, had never been submerged, now gave him a safe retreat. He was first placed in a philosophical professorship in Dickinson's College, and afterwards in a highly honorable post in the University of Pennsylvania, which he finally abandoned for the chemical chair in Columbia College, South Carolina, of which he soon became president. In the nullification struggle he took a bold part, issuing documents of the most ultra States' rights

James Priestley[b] suggested to him to apply for the place. The objections were raised that he was not a native, and was not of the President's political views. Dr. Priestley thought such objections of little moment. For, said he, if Mr. Adams means to be the ruler of a nation and not the leader of a party, he will be glad of a chance to show it. A letter was, therefore, written by Dr. Priestley to the President presenting Cooper's name for the place. With it went one from Cooper himself. The office was given to another, and no answer to either letter was ever received. Cooper then set up a newspaper, warmly supported the Republican cause, and opposed the administration of President Adams. A reader of a rival newspaper wrote a letter in which he

tone, and showing that if he had added nothing to the sprightliness, he had lost nothing of the fire, of the pamphleteer of 1795-1800. He died in 1840, when engaged in revising the South Carolina statutes, a duty charged on him by the legislature, after having published, besides numberless tracts on politics, divinity, and metaphysics, a treatise on the bankrupt laws, a translation of Justinian, a treatise on political economy, a manual of chemistry, as well as a general compendium of useful information."

[b] PRIESTLEY, JOSEPH. (1733-1804.) Born Bristol, England. "On the fourteenth day of January, 1791, an angry Birmingham mob had fired the doctor's house and burned it with all the books and apparatus it contained. Smarting under his wrongs, Priestley collected what property remained to him and sought refuge in the United States. Had he come a few years earlier or a few years later, a dozen lines in the Daily Advertiser would, undoubtedly, have been thought all his arrival deserved. But he landed in 1794 when the insolence, the injustice, the high-handed outrages of British officials had driven the Republicans into all manner of foolish acts. That he was the greatest of all chemists then living; that he had won the Copley medal; had discovered oxygen gas, carbonic-acid gas, nitrous-oxide gas, sulphurous-oxide gas, and had proved that the red color of arterial blood is due to the oxygen of the air, was to the Republicans of small moment. That he had answered Burke's 'Reflections' and been maltreated by an English mob, was, however, of the greatest moment. It gave a new opportunity to express the fierce hatred they felt toward England, and they gladly seized it. They hailed him as a martyr and overwhelmed him with attention. The Democratic Society addressed him. The Tammany Society addressed him. The Associated Teachers and the Republican natives of England and Ireland got up demonstrations in his behalf." McMaster, Hist. People of the U. S., Vol. 2, p. 207.

asked if this editor who was attacking the President was the same Thomas Cooper who once sought office of the man he now reviled. Cooper replied that he was the same man and could see nothing improper in what he had done. Not he, but John Adams, had changed. In 1797 the President "was hardly in the infancy of political mistakes." Then he had not declared a Republican government might mean anything; had not sanctioned the Alien and Sedition Laws and the abolition of trial by jury; had not saddled the country with the expense of a standing army; had not inflicted it with a permanent navy; had not brought its credit so low as to borrow money at eight per cent; had not planned embassies to Russia, Prussia and the Sublime Porte, nor interfered with the course of justice, nor delivered poor Robbins to the mock-trial of a British court martial.

For this publication Cooper was indicted under the Sedition Act for libeling the President of the United States. He pleaded not guilty, pleaded the truth of the facts, and asked subpoenas to issue for the President and a number of the members of the Senate and House. Judge Chase forbade this and declared the attempt to subpoena the President an improper and indecent act. Congress being in session, the members summoned might have stood upon their privileges and refused to come. But they came voluntarily, sat through the trial, and were made no use of by Cooper.

When the jury had pronounced him guilty and the sentence of the court was about to be imposed, Judge Chase asked who was to pay the fine. If the Republican party, then the court would go to the very limit of the law. If Mr. Cooper, then the court would consider the circumstances. Judge Peters frankly declared that the matter of party had nothing to do with the fine. Mr. Cooper was to be punished, and not the Republican party. The fine was, therefore, made four hundred dollars, and the term of imprisonment fixed at six months.[1]

[1] This narrative of the Trial is taken from McMaster's description of it in Vol. 2, Hist. People U. S., pp. 465-467.

THE TRIAL.[1]

In the United States Circuit Court, Philadelphia, Pennsylvania, 1800.

HON. SAMUEL CHASE,[2] } *Judges.*
HON. RICHARD PETERS,[3] }

April 11.

An indictment had been found against Thomas Cooper under the Sedition Act which made it a crime to be punished by fine and imprisonment for any one to print or publish any false, scandalous and malicious writings against the Government, Congress or the President, with intent to defame them, to bring them into contempt or to excite the hatred of the people against them, for the following seditious libel against John Adams, President of the United States.

The libelous matter set out in the indictment was as follows:

"Nor do I see any impropriety in making this request of Mr. Adams. At that time he had just entered into office; he was hardly in the infancy of political mistakes; even those who doubted his capacity thought well of his intentions. Nor were we yet saddled with the expense of a permanent navy, or threatened, under his auspices, with the existence of a standing army. Our credit was not yet reduced so low as to borrow money at eight per cent in time of peace, while the unnecessary violence of official expressions might justly have provoked a war. Mr. Adams had not yet projected his embassies to Prussia, Russia and the Sublime Porte, nor had he yet

[1] *Bibliography.* *"An account of the Trial of Thomas Cooper of Northumberland, on a charge of libel against the President of the United States. Taken in shorthand by Thomas Cooper."
*Wharton's State Trials, see 4 Am. St. Tr., 616.

[2] CHASE, SAMUEL. (1741-1811.) Born Somerset Co., Md.; studied law at Annapolis and admitted to bar, 1761; member of Colonial Legislature and prominent in Stamp Act agitation; a signer of the Declaration of Independence; United States Commissioner (with Franklin and Carroll) to Canada; removed to Baltimore, 1786; Chief Justice Baltimore Criminal Court, 1788; member Maryland convention to ratify the Federal Constitution; Chief Justice General Court, Maryland, 1791; Associate Justice Supreme Court of the United States, 1796-1811.

[3] See 4 Am. St. Tr., 616.

interfered, as President of the United States, to influence the decisions of a court of justice—a stretch of authority which the monarch of Great Britain would have shrunk from—an interference without precedent, against law and against mercy. This melancholy case of Jonathan Robbins (See 7 Am. St. Tr., 811), a native citizen of America, forcibly impressed by the British, and delivered up, with the advice of Mr. Adams, to the mock trial of a British court-martial, had not yet astonished the republican citizens of this free country; a case too little known, but of which the people ought to be fully apprised, before the election, and they shall be."[4]

[4] These passages were taken from the following publication:

TO THE PUBLIC.

To the Printer.

Sir,—I should not condescend to answer anonymous slander, but the information on which the falsehoods contained in the following paragraph are grounded, must have been originally derived from the President himself. I cannot believe him capable of such misrepresentation, for I still think well of his intentions, however I may disapprove of his conduct: but the following narrative will show that some of his underlings are capable of anything.

From the Reading Weekly Advertiser of October 26, 1799.

COMMUNICATION.

"Thomas Cooper's address to the readers of the Sunbury and Northumberland Gazette of which he was editor, having been republished in this State, with an introduction approbatory of the piece, a correspondent wishes to know if it be the same Thomas Cooper, an Englishman, of whom the following anecdote is related? If it is, every paper devoted to truth, honor and decency, ought to give it a thorough circulation.

Not many months ago, it is said, a Mr. Cooper, an Englishman, applied to the President of the United States, to be appointed 'agent for settling the respective claims of the citizens and subjects of this country and Great Britain.' In his letter, he informs the President, that although he (Thomas Cooper) had been called a Democrat, yet his real political sentiments are such as would be agreeable to the President and Government of the United States or expressions to that effect. This letter was accompanied with another from Dr. Joseph Priestley, who did not fail to assure the President of the pliability of his friend Cooper's democratic principles. The President, it is said, rejected Cooper's application with disdain, and Priestley's with still stronger marks of surprise, saying, it is said, as he threw the letter on the table, does he think that I would appoint any Englishman to that important office in preference to an American? What was the consequence? When Thomas Cooper found his application for a lucrative office under our President rejected, he writes in revenge the address which appeared in print,

and Dr. Priestley exerted his influence in dispersing this very address, which he must know was the offspring of disappointment and revenge!

The address is as cunning and insidious a production as ever appeared in the Aurora or the old Chronicle, and as for impudence, it exceeds, or at least equals, Porcupine himself. Priestley and Cooper are both called upon to deny the above narrative. A recourse to the letters themselves, would establish the accuracy of this anecdote, even to a syllable."

Yes; I am the Thomas Cooper alluded to—luckily possessed of more accurate information than the malignant writer of that paragraph, from whatever source his intelligence was derived.

About the time of the appointment of commissioners under the British treaty, Doctor Ross, who had sedulously brought about an intercourse of civility between Mr. Liston and myself, urged me to permit him to apply on my behalf to that gentleman, for one of the appointments that must then take place. He pressed on me the folly, as he termed it, of my confining myself to Northumberland, his earnest wish to see me settled in Philadelphia, and the duty I owed my family to better my situation by every means in my power. He stated that Mr. Liston, he knew, thought highly of me, and though the post of the fifth commissioner was probably then disposed of, there must be an agent for the British claimants; an office which, from my situation as a barrister in England, and my knowledge of mercantile transactions, I was peculiarly fitted to fill. I replied that he probably overrated Mr. Liston's opinion and his own influence, and that, at all events, my known political opinions must render it equally improper for Mr. Liston to give, and for me to accept any office whatever connected with the British interests. That Mr. Liston and I understood each other on this question, and had hitherto avoided all politics whatever. That, being an American, I should not object to any office under this Government, if I could fairly obtain it; but that I would never consent to any application to Mr. Liston.

Through Mr. Coleman's interest, Mr. Hall of Sunbury, was complimented with the offer of being appointed agent of American claims. On mentioning to Dr. Priestley, one night at supper, that Mr. Hall had declined it, Dr. Ross' persuasions occurred to me, and I said that such an office as that would have suited me very well. Dr. Priestley replied, if that was the case, he thought he had some interest with Mr. Adams, with whom he had long been acquainted and who had always expressed himself in terms of the highest friendship. That, as he never intended to ask any favor of Mr. Adams for himself, I might as well let him try for once to ask one for me. On my objecting that Mr. Adams' politics and mine were probably very different, Dr. Priestley declared that this, so far from being an objection, might be an inducement in my favor; for if Mr. Adams meant to be the ruler of a nation, instead of the leader of a party, he would be glad of an opportunity to exhibit such an instance of liberal conduct. At length I consented, expressly request-

ing Dr. Priestley to take care that Mr. Adams should not mistake my politics. In consequence of this conversation, Dr. Priestley wrote the following letter; not a few months, but above two years ago.

August 12, 1797.

Dear Sir:—It was far from being my intention or wish to trouble you with the request of any favors, though it is now in your power to grant them; and it is not at all probable that I shall ever take a second liberty of the kind. But circumstances have arisen which I think call upon me to do it once, though not for myself, but a friend. The office of agent for American claims was offered, I understand, to Mr. Hall of Sunbury, and he has declined it. If this be the case, and no other person be yet fixed upon, I shall be very happy if I could serve Mr. Cooper, a man I doubt not of equal ability, and possessed of every other qualification for the office, by recommending him. It is true, that both he and myself fall, in the language of our calumniators, under the description of Democrats, who are studiously represented as enemies to what is called government, both in England and here. What I have done to deserve that character, you well know, and Mr. Cooper has done very little more. In fact, we have both been persecuted for being friends to American liberty, and our preference of the government of this country has brought us both hither. However, were the accusations true, I think the appointment of a man of unquestionable ability and fidelity to his trust, for which I would make myself answerable, would be truly such a mark of superiority to popular prejudice as I should expect from you. I, therefore, think it no unfavorable circumstance in the recommendation. That you will act according to your best judgment, I have no doubt, with respect to this and other affairs of infinitely more moment, through which I am persuaded you will bring the country with reputation to yourself, though in circumstances of such uncommon difficulty, perhaps with less ease and satisfaction than I could wish. With my earnest wishes for the honor and tranquility of your presidency, I am, etc.,

Joseph Priestley.

This letter was accompanied by the following from myself.

Sir:—On my expressing an inclination for the office which Mr. Hall has declined, Dr. Priestley was so good as to offer his services with you on my behalf.

Probably the office will be filled ere this letter can reach you. Probably there may be objections to nominating a person not a native of the country. Probably the objection mentioned by Dr. Priestley may reasonably be deemed of weight in my instance. Be all this as it may, I see no impropriety in the present application to be appointed agent of American claims, for it is still possible I may suppose more weight in the objections than they will be found to deserve. If it should so happen that I am nominated to that office, I shall endeavor to merit the character the Doctor has given me, and your esteem. I am, etc., Thomas Cooper.

Is this the letter of a man or not? I do not appeal to the cowardly propagator of anonymous falsehoods, but to the public. What is there in it of vanity or servility? Do not these letters take for granted that I am a Democrat, though not a disturber of all government? And that what I am I shall remain, even though it be deemed a reasonable objection to my appointment? Is this, or is this not, adhering to my principle, whatever becomes of my interest?

Nor is it true that my address originated from any motive of revenge. Two years elapsed from the date of those letters, before I wrote anything on the politics of this country. Nor did I recollect them at the time. Nor do I see the objection to taking any fair means of improving my situation. This is a duty incumbent on every prudent man who has a family to raise and which I have already too much neglected from public motives; nor can any office to which I am eligible in this country, recompense me for the offers I rejected in its favor. But it is not in the power of promises or threats, of wealth or poverty, to extinguish the political enthusiasm which has actuated my conduct for these twenty years. The prudence of middle age and the claims of duty may make me cautious of sacrificing my interest, but they cannot induce me to sacrifice my principle.

Nor do I see any impropriety in making this request of Mr. Adams. At that time he had just entered into office. He was hardly in the infancy of political mistake; even those who doubted his capacity, thought well of his intentions. He had not at that time given the public to understand that he would bestow no office but under implicit conformity to his political opinions. He had not declared that "a republican government may mean anything;" he had not yet sanctioned the abolition of trial by jury in the alien law, or entrenched his public character behind the legal barriers of the sedition law. Nor were we yet saddled with the expense of a permanent navy, or threatened under his auspices with the existence of a standing army. Our credit was not yet reduced so low as to borrow money at eight per cent in time of peace, while the unnecessary violence of official expressions might justly provoke a war. Nor had the political acrimony which still poisons the pleasures of private society, been fostered by those who call themselves his friends and adherents; nor had the eminent services of Mr. Humphreys at that time received their reward. Mr. Adams had not yet projected his embassies to Prussia, Russia, and the Sublime Porte; nor had yet interfered, as President of the United States, to influence the decisions of a court of justice. A stretch of authority which the monarch of Great Britain would have shrunk from; an interference without precedent, against law and against mercy! This melancholy case of Jonathan Robbins, a native citizen of America, forcibly impressed by the British, and delivered up, with the advice of Mr. Adams, to the mock trial of a British court martial, had not yet astonished the republican citizens of this free

country. A case too little known, but of which the people ought to be fully apprised before the election, and they shall be.

Most assuredly, had these transactions taken place in August, 1797, then President Adams would not have been troubled by any request from Thomas Cooper.

Northumberland, Nov. 2, 1797.

The Prisoner, without counsel, appeared in his own behalf and pleaded *not guilty,* and the jury was selected.

William Rawle,[5] District Attorney, for the United States.

A question arose at the outset concerning the right of the prisoner to compel the attendance, as witnesses, of several members of Congress (Congress being then in session), and of the President.

Mr. Cooper asked the court to address a letter to the Speaker of the House, requesting him to have process served. JUDGE PETERS thought this the proper course. JUDGE CHASE ordered process to issue without such letter, saying, that if it was necessary to compel the attendance of the members, the case would be continued until the session was over. He at the same time refused to permit a subpoena to issue directed to the President of the United States, saying that it was an improper and an indecent act.

The cause was continued to April 19, in order to enable defendant to procure documentary and other evidence which he considered material.

April 19.

The difficulty in obtaining the attendance of the members of Congress who were subpoenaed was ultimately waived by them; several of them appearing voluntarily in court and ready to give their testimony.

The *Jury* was sworn.

Mr. Rawle. The defendant stands charged with attempts which the practice and policy of all civilized nations have thought it right at all times to punish with severity, with having published a false, scandalous and malicious attack on the character of the President of the United States, with an

[5] See 4 Am. St. Tr., 624.

intent to excite the hatred and contempt of the people of this country against the man of their choice.

It was much to be lamented that every person who had a tolerable facility at writing should think he had a right to attack and overset those authorities and officers whom the people of this country had thought fit to appoint. Nor was it to be endured that foul and infamous falsehoods should be uttered and published with impunity against the President of the United States, whom the people themselves had placed in that high office, and in which he has acted with so much credit to himself and benefit to them. Thomas Cooper stands charged in the indictment as follows—(here Mr. R. read the indictment:)—It was a sense of public duty that called for this prosecution. It was necessary that an example should be made to deter others from misleading the people by such false and defamatory publications. There was a peculiarity in the manner also of this publication: we generally observe that persons who take these liberties endeavor to avoid punishment by sheltering themselves under fictitious signatures, or by concealing their names; but the defendant acted very differently. Being of the profession of the law, a man of education and literature, he availed himself of those advantages for the purpose of disseminating his dangerous productions in a remote part of the country where he had gained influence. Such conduct must have arisen from the basest motives. It would be proved to the jury that, at the time of this publication, the defendant went to a magistrate and acknowledged it to be his production, in the same formal manner as if it had been a deed.

A conduct so grossly improper had occurred in no instance within his recollection, and the manner constituted no slight aggravation of the offense. Indeed, it was high time for the law to interfere and restrain the libellous spirit which had been so long permitted to extend itself against the highest and most deserving characters.

To abuse the men with whom the public has entrusted the management of their national concerns, to withdraw from

them the confidence of the people, so necessary for conducting the public business, was in direct opposition to the duties of a good citizen. Mischiefs of this kind were to be dreaded in proportion as the country around is less informed, and a man of sense and education has it more in his power to extend the mischief which he is inclined to propagate. Government should not encourage the idea, that they would not prosecute such atrocious conduct; for if this conduct was allowed to pass over, the peace of the country would be endangered.

Error leads to discontent, discontent to a fancied idea of oppression, and that to insurrection, of which the two instances which had already happened were alarming proofs, and well known to the jury.

That the jury, as citizens, must determine whether from the publications of this kind, the prosperity of the country was not endangered; and whether it was not their duty, when a case of this nature was laid before them and the law was applicable, to bring in such a verdict as the law and the evidence would warrant; and show, that these kinds of attacks on the government of the country were not to be suffered with impunity.

THE EVIDENCE.

John Buyers. Know this paper; Mr. Cooper brought it to me on the evening 6th of December, 1799, at my house in Sunbury. He came to me at the door of my house. Asked me to walk in. We walked in. This was between candlelight and daylight. He asked for a candle. He perused this paper which I have in my hand, pointed to his name, and said: "This is my name, and I am the author of this piece." There was nothing further passed, only he said: "This may save you trouble another time." I knew very well what he meant by it.

Mr. Cooper. Had not you and I been in the habit of frequently joking with each other upon political subjects? O, yes—very often.

Mr. Rawle read that part of the publication which is included in the indictment.

Mr. Cooper. Gentlemen of the jury: If it were true, as it is not true, that, in the language of the Attorney General of the district, I have been guilty of publishing with the basest

motives a foul and infamous libel on the character of the President; of exciting against him the hatred and contempt of the people of this country, by gross and malicious falsehoods —then, indeed, would it be his duty to bring before me this tribunal, it would be yours to convict, and the duty of the court to punish me.

But I hope, in the course of this trial, I shall be enabled to prove to your satisfaction, that I have published nothing which truth will not justify. That the assertions for which I am indicted are free from malicious imputation, and that my motives have been honest and fair.

You will observe, gentlemen of the jury, that the law requires it to be proved as a necessary part of the charge, that the passages for which I am indicted should be false and scandalous, and published from malicious motives. And before you will be able, consistently with your oaths, to convict upon this indictment, you must be thoroughly satisfied that both these parts of the charge are well founded. Nor does it appear to be that the expression of the act, to bring the President into contempt, can be fulfilled, if the accusation, as in the present instance, related to an examination of his public conduct, and no improper motives are imputed to him. And that I have carefully avoided imputing any impropriety of intention to the President, even in the very paper complained of; that the uniform tenor of my conduct and language has been to attribute honesty of motive even where I have strongly disapproved of the tendency of his measures, I can abundantly show.

You, and all who hear me, well know that this country is divided, and almost equally divided, into two grand parties; usually termed, whether properly or improperly, Federalists and Anti-Federalists; and that the governing powers of the country are ranked in public opinion under the former denomination—of these divisions, the one wishes to increase, the other to diminish, the powers of the executive; the one thinks that the people (the democracy of the country) has too much,

the other too little, influence on the measures of government. The one is friendly, the other hostile, to a standing army and a permanent navy. The one thinks them necessary to repel invasions and aggressions from without, and commotion within; the other, that a well-organized militia is a sufficient safeguard for all that an army could protect, and that a navy is more dangerous and expensive than any benefit derived from it can compensate; the one thinks the liberties of our country endangered by the licentiousness, the other, by the restrictions of the press. Such are some among the leading features of these notorious divisions of political party. It is evident, gentlemen of the jury, that each will view with a jealous eye the positions of the other, and that there cannot but be a bias among the partisans of the one side, against the principles and doctrines inculcated by the other. In the present instance, I fear it cannot but have its effects; for, without impeaching the integrity of any person directly concerned in the progress of the present trial, I may fairly state that, under the Sedition Law, a defendant, such as I stand before you, is placed in a situation unknown in any other case.

Directly or indirectly, the public, if not the private, character of the President of the United States is involved in the present trial. Who nominates the judges who are to preside? the juries who are to judge of the evidence? the marshal who has the summoning of the jury? the President. Suppose a case of arbitration concerning the property of any one of you, where the adverse party should claim the right of nominating the persons whose legal opinions are to decide the law of the question, and of the very man who shall have the appointment of the arbitrators—what would you say to such a trial? and yet in fact such is mine, and such is the trial of every man who has the misfortune to be indicted under this law. But although I have a right to presume something of political bias against my opinions, from the court who try me, to you who sit there as jurymen, I am still satisfied you will feel that you have some character to support and some character to lose; and whatever your opinions may be on the subjects

alluded to in the indictment, you will reverence as you ought the sacred obligation of the oath you have taken.

Gentlemen of the jury, I acknowledge, as freely as any of you can, the necessity of a certain degree of confidence in the executive government of the country. But this confidence ought not to be unlimited, and need not be paid up in advance; let it be earned before it be reposed; let it be claimed by the evidence of benefits conferred, of measures that compel approbation, of conduct irreproachable. It cannot be exacted by the guarded provisions of sedition laws, by attacks on the freedom of the press, by prosecutions, pains and penalties on those which boldly express the truth, or who may honestly and innocently err in their political sentiments. Let this required confidence be the meed of desert, and the public will not be backward to pay it.

But in the present state of affairs, the press is open to those who will praise, while the threats of the law hang over those who blame the conduct of the men in power. Indiscriminate approbation of the measures of the executive is not only unattacked, but fostered, and received with the utmost avidity; while those who venture to express a sentiment of opposition must do it in fear and trembling, and run the hazard of being dragged like myself before the frowning tribunal, erected by the Sedition Law. Be it so; but surely this anxiety to protect public character must arise from fear of attack. That conduct which will not bear investigation will naturally shun it; and whether my opinions are right or wrong, as they are stated in the charge, I cannot help thinking they would have been better confuted by evidence and argument than by indictment. Fines and imprisonment will produce conviction neither in the mind of the sufferer nor of the public.

Nor do I see how the people can exercise on rational grounds their elective franchise, if perfect freedom of discussion of public characters be not allowed. Electors are bound in conscience to reflect and decide who best deserves their suffrages; but how can they do it, if these prosecutions *in terrorem*

close all the avenues of information, and throw a veil over the grossest misconduct of our periodical rulers?

After having offered these preliminary remarks, I shall give an account of the paper on which I am accused, and then proceed to examine the charges of the indictment in the order in which they are laid. Much that I intended to have advanced I must relinquish, that I may not trespass too long on your time, or weaken the effect of my own defense by fatiguing your attention.

The scored paper now handed to me by the Attorney General, suggests an observation which, though trite, is material. Upon the plan usually adopted in these *ex-officio* accusations, a good Christian might easily be proved an arrant atheist. "The fool hath said in his heart, there is no God." Take the four last words, and they are atheistical. Take the sentence, and it is Scripture. So, take the marked passages in this paper, and they may, perhaps, be forced into something like improper imputation against the President. Take the paper itself, and the very first paragraph is a plain and positive approbation of his intention. Though I must acknowledge that, however upright I might formerly have believed his motives of action, I cannot, upon reflection, pay that tribute to his conduct or his motives on the present occasion.

The general circumstances that gave rise to the paper I now hold, are these: Dr. Priestley, a man whose name implies a greater combination of learning, science, and ability, of important discovery, of exertion for the benefit of mankind, and of private integrity, than any other man now living can boast—whose conduct towards me, in the instance detailed in this paper, is praise sufficient to bear up my mind against any consequences which the present trial can produce —had long been an acquaintance and an intimate acquaintance of Mr. Adams, in England and in this country. The letters of the latter to Dr. Priestley are full of strong expressions of friendship and esteem. Relying upon this long intercourse of cordialty between them, Dr. Priestley urged me to permit him to write to Mr. Adams on the subject of a vacancy men-

tioned in this paper, and which, as you will have it before you when you retire, I shall not read at length. This application was from one friend to another; upon the face of it a confidential communcation; although containing nothing but what might do credit to all the parties concerned. Mr. Adams, however, did not think it so confidential; and from some disclosure on his part, has been founded the base and cowardly slander which dragged me in the first instance before the public in vindication of my moral and political character, and has at length dragged me before this tribunal, to protect, if I can, my personal liberty and my private fortune, against the legal attack of an *ex-officio* information. Hence, it is evident, gentlemen of the jury, that this is not a voluntary, but an involuntary publication on my part. It has originated, not from motives of turbulence and malice, but from self-defense; not from a desire of attacking the character of the President, but of vindicating my own. And in what way have I done this? My motives, my private character, my public character, were the object of falsehood and calumny, apparently founded on information of high authority. In reply, I give credit to the intentions of the President. I say nothing of his private character; and I attack only the tendency of measures notorious to the world, which, having been known to disapprove publicly, I was charged with being ready, from motives of interest, to approve privately. I think, gentlemen, you cannot help feeling this contrast of behavior, and if the President is satisfied with his side of the picture, I am mine.

The first article selected for accusation is, that, at the time I allude to, he was but in the infancy of political mistake. Why this expression should have been fixed on as seditious, I know not, unless it be that *quem deus vult perdere prius dementat;* for have we advanced so far on the road to despotism in this republican country, that we dare not say our President may be mistaken? Is a plain citizen encircled at once by the mysterious attribute of political infallibility the instant he mounts the presidential chair? If so, then indeed

may it be seditious to say he is mistaken; but before you can condemn me for this kind of sedition, you must become catholic believers in this new-fangled doctrine of infallibility. I know that in England the king can do no wrong, but I did not know till now that the President of the United States had the same attribute.

I have said (and I am accused for saying it) "that even those who doubted his capacity thought well of his intentions." Is it a crime to doubt the capacity of the President? Suppose I had said that there were some who did not give him credit for capacity sufficient for the office he holds, is that a crime? Or if in them, is it a crime in me, who have not said it? Nor can the word capacity here be fairly construed into any other than a comparative meaning; for surely no one who has read his Defense, as it is called, of the American Constitution, or who reflects that he has had abilities enough to raise himself to his present situation, can say that he is devoid either of industry or talents. But those who voted for his opponent must have believed Mr. Adams of inferior capacity to that gentleman. Of that number was I; of that number was at least one-half of the people of the United States. If it be a crime thus to have thought and thus to have spoken, I fear I shall continue in this respect incorrigible. But if of two constructions the one is absurd, improbable and unfavorable, surely it should be rejected in favor of that meaning which was most likely to have occurred, and which in its effects will do least injury to a defendant like myself. This is common, this is legal charity.

Nor had we yet, under his auspices, been saddled with the expense of a permanent navy.

Gentlemen, is it true or not that we are saddled with the expense of a permanent navy? Is it necessary that I should enter into a detail of authorities to prove that the sun shines at noon-day? But farther, is it true that we incur this expense under his auspices and sanction?

I have before me two publications. The one the Gazette of the United States, published by Mr. Fenno in this city; and

another, in a form more portable and convenient, purporting to be a selection of addresses and answers to and from the President during the summer of 1798. Not having been able to procure office copies of the documents I wished to refer to, I must offer in evidence such publications as I can find; that class of publications, upon which in fact the mind of the public is usually made up; and upon whose authority the electors of this country determine the characters whom they honor with their suffrage. Indeed, if the opinion that fell from the court this morning be accurate, that no man should hazard an assertion but upon sufficient and legal evidence, and if documents from the public offices in proof of notorious facts are required as such evidence, then are the mouths of the people completely shut up on every question of public conduct or public character. But I cannot help thinking it a fair and reasonable position, that a defendant in such a case as this should be permitted to offer to the jury any evidence that appears to him a sufficient ground for his assertion, and let them decide on its credibility.

JUDGE CHASE. What is it that you say, sir, fell from the court? They have not yet decided what was or what not proper evidence for you to adduce. The court said, if you thought the public documents at your service, you were mistaken. If you undertake to publish, without having proper evidence before you to justify your assertions, you do it at your own risk. Most assuredly, in common traverses, you could not offer the evidence you mention. But we acknowledge that, in such a case as this, great latitude may be given. If you say the President did write a letter, you must prove it. We should incline to admit gazettes and acts of public authority and notoriety. You might read the speech of the President to both Houses of Congress in evidence. If you want to prove that the President advocated a navy, you may read the journals of Congress or any authentic public document.

Mr. Cooper. If I am defeated in my endeavors to procure these documents, I must offer such evidence as I can procure;

and where there is no reasonable suspicion or assignable motive why the publications I offer should misrepresent the transactions I allude to, the probability is in favor of their accuracy; especially when the printers of them are severely punishable for wilful misrepresentation or gross mistake in detailing the public acts of government.

JUDGE PETERS. I admit a great many things from Mr. Cooper, who is without counsel, which I would not admit from others.

JUDGE CHASE. You may read anything and everything you please.

(*Mr. Cooper* went on to argue at length, from a copious collection from the public documents of the day, that the policy of the President had been to saddle upon the country a permanent navy and army, and to keep down the liberties of the citizens by his arbitrary interference in the case of Jonathan Robbins.)

Gentlemen, I have gone through all the charges, and I am satisfied that I have brought in support of my assertions the best evidence the nature of my case would admit of. It is true, by resorting to Danbury for depositions and to Charlestown for records, I might have made the evidence in the last charge more complete; but I did not and do not think them necessary to produce further conviction on your minds than you feel on the subject already. This is an important point under the law in question. If such strictness of testimony is required, there is an end at once of all political conversation in promiscuous society. The time, the labor, the difficulty, the expense, the harassment and fatigue of minds as well as of body, which such doctrine would occasion to every citizen whom a corrupt administration might determine to ruin, would be an engine of oppression of itself sufficiently powerful to establish a perfect despotism over the press; and would be a punishment for innocence before trial, too severe to be inflicted on sedition itself. I think you must feel the truth of these remarks. The proceedings on this trial irresistibly suggest them.

Gentlemen, if the assertions I have made are true, whatever the motives of them may be, you cannot find me guilty. But I think it impossible, if you consider the paper altogether, that you can ascribe the publication of it to malice. It is on the force of it not voluntary, but compelled. I have, in the very outset of the paper, spoken well of the President. I have been in the habit of thinking his intentions right, and his public conduct wrong: and that this has been the general tenor of my language and behavior, I believe I can even now bring proof enough from among my friends and my neighbors.

JUDGE CHASE. This is not necessary. It is your conduct, not your character, that is in question. If this prosecution were for a crime against the United States, you might give evidence to your character, and show that you have always been a good citizen; but this is an indictment for a libel against the President, where your general character is not in question.

Mr. Cooper. I am satisfied. I shall fatigue the jury no longer; but rest my defense here.

Mr. Rawle. Gentlemen of the jury: The defense you have just heard is one of the most extraordinary and unexampled I ever remember to have witnessed in a court of justice. It is no less than to call into decision whether Thomas Cooper, the defendant, or the President of the United States, to whom this country has thought proper to confide its most important interests, is best qualified to judge whether the measures adopted by our government are calculated to preserve the peace and promote the happiness of America. This, however, does not seem to me the real point which you are to try; and I shall therefore (under direction of the court) proceed to state what I conceive to be the question which you, gentlemen of the jury, are now called upon to determine. Thomas Cooper is charged in the indictment with having published a false, scandalous and malicious libel, with intent to defame the President of the United States, and to bring him into contempt and disrepute, and to excite against him the hatred

of the good people of this country. In the act which defines this offense and points out the punishment, a liberality of defense is given, unknown, I believe, in any other country where the party is tried for a libel on the government. Here the defendant is allowed, under the third section of that act, to give in evidence the truth of the matters charged as a libel in the publication, and the jury have a right to determine the law and the fact under the direction of the court. The true spirit of the law is that the defendant shall not be found guilty of publishing defamatory writings, unless they be false, nor, although they may be false, shall he be considered as guilty under the law, unless the intent of the publication appear to be malicious.

That such publication has proceeded upon a knowledge of the truth, he is permitted to give as matter of evidence; and if true, it must be allowed to go far to satisfy the minds of the jury that the malicious motives imputed to him are not true. In private actions for slander, where a man seeks pecuniary redress for the injury his character has sustained, the defendant is entitled to give in evidence, as a defense to the action, the truth of the words spoken or the written libel; and if the truth of the assertions be proved, it will amount to a justification. There is no difference, then, between the defense that may be set up to an action of slander, or libel on a private person, and that which is permitted under the law whereon this indictment is grounded.

The defendant has undertaken to satisfy the mind of the jury that, in this publication, he had no malicious intention against the President of the United States; I join issue with him on the point, and request your particular attention to it. He alleges that he did not impute improper motives to the President, and attempts to substantiate his allegation by referring you to his declaration in the outset, where he says that "I cannot believe him (the President) capable of such gross misrepresentations, for I still think well of his intentions, however I may disapprove of his conduct;" but to this I shall add that he goes on and concludes with a paragraph,

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JUDGE CHASE. This is not necessary. It is your conduct, not your character, that is in question. If this prosecution were for a crime against the United States, you might give evidence to your character, and show that you have always been a good citizen; but this is an indictment for a libel against the President, where your general character is not in question.

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of the good people of this country. In the act which defines this offense and points out the punishment, a liberality of defense is given, unknown, I believe, in any other country where the party is tried for a libel on the government. Here the defendant is allowed, under the third section of that act, to give in evidence the truth of the matters charged as a libel in the publication, and the jury have a right to determine the law and the fact under the direction of the court. The true spirit of the law is that the defendant shall not be found guilty of publishing defamatory writings, unless they be false, nor, although they may be false, shall he be considered as guilty under the law, unless the intent of the publication appear to be malicious.

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evincing in the clearest manner a settled design to persuade the public that the President of the United States is not fit for the high office he bears, and of this you must be fully convinced from the whole tenor of the expressions which have been read to you in the indictment.

It is very far from my views to press hard upon any part of his long address to you, or to make use against him of any unguarded expression, which, on more deliberate consideration, he might have omitted or corrected; yet, when I cannot but observe, from the whole tenor of his present argument, as well as from his publication, that his object is not so much to convince you, gentlemen of the jury, that his assertions are true, as to cast an unmerited reflection on the general character and conduct of the President, I cannot help suspecting him of the motives he disclaims, and I must do my duty by exposing the design as well as the fallacy of the justification he has set up.

The defendant has used a little observation respecting the separating in the indictment the text from the context, as I believe he was pleased to term it; and argued that by this means the most upright intentions and laudable expressions might be perverted from their true and obvious meaning. Such an insinuation, however, is not calculated to influence your minds. In framing an indictment, it is my duty to leave out matters of little importance, and to introduce those circumstances only that are truly and legally reprehensible: and he well knows that he can read, if he pleases, the whole of the publication, and that you will have it with you when you consider of your verdict. You will judge, therefore, whether by this observation, it was his, or whether it is my design to confound and perplex the sense.

Whether the reflections he has thrown upon the conduct of government, in so many instances throughout his defense as well as in his publication, evince the regard he professes to entertain for the intentions of the President, is to me, as it will be to you, extremely dubious; nor have those professions been confirmed by the singular manner in which he has cited

and selected the passages on which his defense has been grounded. Throughout the quotations he has made, particularly from the addresses to the President, and the answers to them, there has been a series of misrepresentations, which it will be my duty to observe upon when I come to consider that part of the charge and his vindication of it. But it is fair to observe that if, from the perusal of partial extracts and passages selected from various publications, he has thought proper to publish a libel, such as that for which he is indicted, against the character of our President, there is no excuse for his conduct; if, on the other hand, he had the whole of the publications before him, and has extracted from them partially and unfairly, his conduct is still more reprehensible, and there is the less excuse, as it is evident, and as you, gentlemen of the jury, must have observed, that he is a man of talents and letters.

Gentlemen, you have attended to the words of this charge in the indictment, and you cannot but be impressed that they convey on the face and in the very tenor of them, a conclusive proof of a *mala mens,* of a malicious and deliberate intention to injure the character of the President. No man can read them without receiving this impression from the perusal.

I have not touched on the article respecting the embassies to Prussia, Russia, and the Porte; because I did not think it of importance sufficient to occupy much of your time. Indeed, I believe no embassy was ever sent to Russia. There is enough for your consideration against the defendant, without dwelling on these lesser articles of the indictment.

Gentlemen, I have no personal animosity against Mr. Cooper; but I have instituted this prosecution because I thought it my duty so to do, and I must make those remarks which the same duty calls forth.

The defendant has endeavored to show that his publication was without malice; but his conduct with Buyers, and his expressions in that publication, proved otherwise. The nature of his defense, though he has stated his opinion of the good intentions of the President, evidently shows that he

meant to justify his own conduct and language throughout. You, gentlemen of the jury, under the direction of the court, will decide whether he has presented to you such a justification as will entitle him to your verdict in his favor.

THE CHARGE TO THE JURY.

JUDGE CHASE. Gentlemen of the jury: When men are found rash enough to commit an offense such as the traverser is charged with, it becomes the duty of the government to take care that they should not pass with impunity. It is my duty to state to you the law on which this indictment is preferred, and the substance of the accusation and defense.

Thomas Cooper, the traverser, stands charged with having published a false, scandalous and malicious libel against the President of the United States, in his official character as President. There is no civilized country that I know of, that does not punish such offenses; and it is necessary to the peace and welfare of this country, that these offenses should meet with their proper punishment, since ours is a government founded on the opinions and confidence of the people. The Representatives and the President are chosen by the people. It is a government made by themselves; and their officers are chosen by themselves; and, therefore, if any improper law is enacted, the people have it in their power to obtain the repeal of such law, or even of the Constitution itself, if found defective, since provision is made for its amendment. Our government, therefore, is really republican; the people are truly represented, since all power is derived from them. It is a government of representation and responsibility. All officers of the government are liable to be displaced or removed, or their duration in office limited by elections at fixed periods. There is one department only, the judiciary, which is not subject to such removal; their offices being held "during good behavior," and therefore they can only be removed for misbehavior.

All governments which I have ever read or heard of punish

libels against themselves. If a man attempts to destroy the confidence of the people in their officers, their supreme magistrate, and their legislature, he effectually saps the foundation of the government. A republican government can only be destroyed in two ways; the introduction of luxury, or the licentiousness of the press. This latter is the more slow, but most sure and certain, means of bringing about the destruction of the government. The legislature of this country, knowing this maxim, has thought proper to pass a law to check this licentiousness of the press. By a clause in that law it is enacted—(He here read the second section of the Sedition Law).

It must, therefore, be observed, gentlemen of the jury, that the intent must be plainly manifest: it is an important word in the law; for if there is no such intent to defame, etc., there is no offense created by that law.

Thomas Cooper, then, stands indicted for having published a false, scandalous and malicious libel upon the President of the United States, with intent to defame the President, to bring him into contempt and disrepute, and to excite against him the hatred of the good people of the United States. This is the charge. The traverser has pleaded not guilty, and that he has not published, etc., with these views: he has also pleaded in justification (which the law provides for), that the matters asserted by him are true, and that he will give the same in evidence.

It is incumbent on the part of the prosecution to prove two facts:

1st. That the traverser did publish the matters contained in the indictment.

2d. That he did publish with intent to defame, etc.

For the intent is as much a fact as the other, and must be proved in the same manner as other facts; and must be proved as stated in the law of Congress—the mere publication is no offense; and in making up your verdict, though you consider them separately, you must take the whole tenor and

import of the publication, since the offense is committed by the two coupled together.

First, then, as to the publication.

The fact of writing and publishing is clearly proved; nay, in fact, it is not denied. It is proved to have taken place at Sunbury, a considerable distance from the seat of government. It appears from the evidence that the traverser went to the house of a justice of the peace with this paper, whom, of all others, he ought to have avoided. For he must know that it was the duty of the justice of the peace to deliver it immediately to those who administer the government. He did so. It was indecent to deliver such a paper to a justice of the peace, and the manner in which it was delivered was yet more outrageous—if it was done in joke, as the traverser would wish to imply, it was still very improper—but there was the same solemnity in his expression, "this is my name, and I am the author of this handbill," as if the traverser was going to part with an estate. This conduct showed that he intended to dare and defy the government, and to provoke them, and his subsequent conduct satisfies my mind that such was his disposition. For he justifies the publication in all its parts, and declares it to be founded in truth. It is proved most clearly to be his publication. It is your business to consider the intent as coupled with that, and view the whole together. You must take that publication, and compare it with the indictment; if there are doubts as to the motives of the traverser, he has removed them; for, though he states in his defense that he does not arraign the motives of the President, yet he has boldly avowed that his own motives in this publication were to censure the conduct of the President, which his conduct, as he thought, deserved. Now, gentlemen, the motives of the President, in his official capacity, are not a subject of inquiry with you. Shall we say to the President, you are not fit for the government of this country? It is no apology for a man to say, that he believes the President to be honest, but that he has done acts which prove him unworthy the confidence of the people, incapable of executing the du-

ties of his high station, and unfit for the important office to which the people have elected him. The motives and intent of the traverser, not of the President, are the subject to be inquired into by you.

Now we will consider this libel as published by the defendant, and observe what were his motives. You will find the traverser speaking of the President in the following words: "Even those who doubted his capacity, thought well of his intentions." This the traverser might suppose would be considered as a compliment as to the intentions of the President; but I have no doubt that it was meant to carry a sting with it which should be felt; for it was in substance saying of the President, "you may have good intentions, but I doubt your capacity."

He then goes on to say, "Nor were we yet saddled with the expense of a permanent navy, nor threatened, under his (the President's) auspices, with the existence of a standing army. Our credit was not yet reduced so low as to borrow money at eight per cent in time of peace." Now, gentlemen, if these things were true, can any one doubt what effect they would have on the public mind? If the people believed those things, what would be the consequence? What! the President of the United States saddle us with a permanent navy, encourage a standing army, and borrow money at a large premium? And are we told, too, that this is in time of peace? If you believe this to be true, what opinion can you, gentlemen, form of the President? One observation must strike you, viz.: That these charges are made not only against the President, but against yourselves who elect the House of Representatives, for these acts cannot be done without first having been approved of by Congress. Can a navy be built, can an army be raised, or money borrowed, without the consent of Congress?

The President is further charged for that "the unnecessary violence of his official expressions might justly have provoked a war." This is a very serious charge indeed. What, the President, by unnecessary violence, plunge this country into a war! and that a just war? It cannot be—I say, gen-

tlemen, again, if you believe this, what opinion can you form of the President? Certainly the worst you can form. You would certainly consider him totally unfit for the high station which he has so honorably filled, and with such benefit to his country.

The traverser states that, under the auspices of the President, "our credit is so low that we are obliged to borrow money at eight per cent in time of peace." I cannot suppress my feelings at this gross attack upon the President. Can this be true? Can you believe it? Are we now in time of peace? Is there no war? No hostilities with France? Has she not captured our vessels and plundered us of our property to the amount of millions? Has not the intercourse been prohibited with her? Have we not armed our vessels to defend ourselves, and have we not captured several of her vessels of war? Although no formal declaration of war has been made, is it not notorious that actual hostilities have taken place? And is this, then, a time of peace? The very expense incurred, which rendered a loan necessary, was in consequence of the conduct of France. The traverser, therefore, has published an untruth, knowing it to be an untruth.

The other part of the publication is much more offensive. I do not allude to his assertions relating to the embassies to Prussia, Russia, and the Sublime Porte. They are matters of little consequence, and, therefore, I shall pass over them. The part to which I allude is that where the traverser charges the President with having influenced the judiciary department. I know of no charge which can be more injurious to the President than that of an attempt to influence a court of judicature; the judicature of the country is of the greatest consequence to the liberties and existence of a nation. If your Constitution was destroyed, so long as the judiciary department remained free and uncontrolled, the liberties of the people would not be endangered. Suffer your courts of judicature to be destroyed; there is an end to your liberties. The traverser says that this interference was a stretch of authority that the monarch of Great Britain would have shrunk

from: an interference without precedent, against law and against mercy. Is not this an attack and a most serious attack on the character of the President?

The traverser goes on thus—"This melancholy case of Jonathan Robbins, a native of America, forcibly impressed by the British, and delivered, with the advice of Mr. Adams, to the mock trial of a British court martial, had not yet astonished the republican citizens of this free country. A case too little known, but of which the people ought to be fully apprised before the election, and they shall be." Now, gentlemen, there are circumstances in this publication which greatly aggravate the offense. The traverser does not only tell you that the President interfered to influence a court of justice without precedent against law and against mercy; but that he so interfered in order to deliver up a native American citizen to be executed by a British court martial under a mock trial, against law and against mercy. Another circumstance is adduced to complete the picture. He tells you that this Robbins was not only an American, but a native American, forcibly impressed by the British; and yet that the President of the United States, without precedent, against law and against mercy, interfered with a court of justice, and ordered this native American to be delivered up to a mock trial by a British court martial. I can scarcely conceive a charge can be made against the President of so much consequence, or of a more heinous nature. But, says Mr. Cooper, he has done it; I will show you the case in which he has done it; it is the case of Jonathan Robbins. It appears then that this is a charge on the President, not only false and scandalous, but evidently made with intent to injure his character, and the manner in which it is made is well calculated to operate on the passions of Americans, and I fear such has been the effect. If this charge were true, there is not a man amongst you but would hate the President; I am sure I should hate him myself if I had thought he had done this. Upon the purity and independence of the judges depend the existence of your government and the preservation of your

liberties. They should be under no influence—they are only accountable to God and their own consciences—your present judges are in that situation.

There is a little circumstance which the Attorney General, in his observations to you, omitted to state, but which I think it right to recall to your recollection, as it appears with what design the traverser made this publication. In this allusion to Jonathan Robbins he expressly tells you this is "a case too little known, but of which the people ought to be fully apprised before the election, and they shall be." Here, then, the evident design of the traverser was, to arouse the people against the President so as to influence their minds against him on the next election. I think it right to explain this to you, because it proves, that the traverser was actuated by improper motives to make this charge against the President. It is a very heavy charge, and made with intent to bring the President into contempt and disrepute, and excite against him the hatred of the people of the United States.

The traverser has read in evidence a report made by the President to the House of Representatives, and a letter written by the Secretary of State, to show that the President had advised and directed this Robbins to be given up; but subsequent facts could not excuse the traverser for what he had written before.

Now, gentlemen, with regard to this delivery of Jonathan Robbins, I am clearly of opinion that the President could not refuse to deliver him up. This same Jonathan Robbins, whose real name appears to have been Nash, was charged with murder committed on board the Hermione British ship of war. This Nash being discovered in America, the British Minister made a requisition to the President that he should be delivered up. Then we must inquire whether the President was obliged to give him up? By the 27th article of the treaty with Great Britain, it is stipulated, "that either of the contracting parties will deliver up to justice all persons who, being charged with murder or forgery committed within the jurisdiction of either, shall seek an asylum within any of the

countries of the other, provided this shall be done only on such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the offense had been there committed." If the President, therefore, by this treaty, was bound to give this Nash up to justice, he was so bound by law; for the treaty is the law of the land. If so, the charge of interference to influence the decisions of a court of justice, is without foundation. The reason why this article was inserted in the treaty, is evident—Murder is a crime against the laws of God and man, and ought never to be committed with impunity. Forgery is an offense affecting all commercial countries, and should never go unpunished; and therefore every government, especially a commercial one, acts wisely in delivering fugitives guilty of such crimes to justice. Nash was charged with having committed murder on board a British ship of war. Now a dispute has arisen whether murder committed on board such a ship of war, was committed within the jurisdiction of Great Britain. I have no doubt as to the point. All vessels, whether public or private, are part of the territory and within the jurisdiction of the nation to which they belong. This is according to the law of nations. All nations have this jurisdiction, and the reason is obvious, for every country carrying on commerce, is answerable to other nations for the conduct of their subjects on the ocean. Were it not so, crimes committed on board vessels of war would go unpunished; for no other country can claim jurisdiction. This person, then, was charged with murder committed on board a British ship of war. I say it was committed within the jurisdiction of Great Britain. By the Constitution (since the treaty is the law of the land), America was bound to give him up. But who is the person to deliver up a fugitive according to that article in the treaty? The President was the only person to take the proper steps, and to take cognizance of the business. He represents the United States in their concerns with foreign powers. This affair could not be tried before a court of law.

No court of justice here has jurisdiction over the crime of murder committed on board a British ship of war. Now, as the requisition was made to the President on the part of the British government to deliver this man up, it became necessary to know whether there was sufficient evidence of his criminality pursuant to the treaty. The judge of the court of Carolina was therefore called upon to inquire into the evidence of his criminality. He was the instrument made use of by the President to ascertain that fact. His delivery was the necessary act of the President, which he was by the treaty and the law of the land, bound to perform; and had he not done so, we should have heard louder complaints from that party who are incessantly opposing and calumniating the government, that the President had grossly neglected his duty by not carrying a solemn treaty into effect. Was this, then, an interference on the part of the President with the judiciary without precedent, against law and against mercy; for doing an act which he was bound by the law of the land to carry into effect, and over which a court of justice had no jurisdiction? Surely not; neither has it merited to be treated in the manner in which the traverser has done in his publication. A defense of greater novelty I never heard before.

Take this publication in all its parts, and it is the boldest attempt I have known to poison the minds of the people. He asserts that Mr. Adams has countenanced a navy, that he has brought forward measures for raising a standing army in the country. The traverser is certainly a scholar, and has shown himself a man of learning, and has read much on the subject of armies. But to assert, as he has done, that we have a standing army in this country, betrays the most egregious ignorance, or the most wilful intentions to deceive the public. We have two descriptions of armies in this country —we have an army which is generally called the Western army, enlisted for five years only—can this be a standing army? Who raises them? Congress. Who pays them? The people. We have also another army, called the provisional army, which is enlisted during the existence of the war with

France—neither of these can, with any propriety, be called a standing army. In fact, we cannot have a standing army in this country, the Constitution having expressly declared that no appropriation shall be made for the support on an army longer than two years. Therefore, as Congress may appropriate money for the support of the army annually, and are obliged to do it only for two years, there can be no standing army in this country until the Constitution is first destroyed.

There is no subject on which the people of America feel more alarm, than the establishment of a standing army. Once persuade them that the government is attempting to promote such a measure, and you destroy their confidence in the government. Therefore, to say, that under the auspices of the President, we were saddled with a standing army, was directly calculated to bring him into contempt with the people, and excite their hatred against him.

It is too much to press this point on the traverser. But he deserves it. This publication is evidently intended to mislead the ignorant, and inflame their minds against the President, and to influence their votes on the next election.

The traverser says, he has proved that the President has advocated a standing army—how has he proved it? There is no standing army; I have before stated, the army is only raised for five years, and during the existing differences—he tells you, Mr. Adams is a friend to the establishment of a navy; I wonder who is not a friend to a navy which is to protect the commerce and power of this country.

The traverser has, to prove these points, read to you many extracts from the addresses and answers to the President. He has selected a number of passages, which, he asserts, prove the approbation of the President to the creation of a navy, and forming a standing army. But we are to recollect gentlemen, that when in consequence of the unjust proceedings of France, the great mass of the people thought proper to address the President, expressing in those addresses, senti-

ments of attachment and confidence in the President, and their determination to resist the oppression of the French government: the President replied to them, in answers which generally were the echo of their sentiments, and in fact, his expressions were as general as the nature of the addresses would permit—therefore, the traverser ought to have blamed the addressers, and not the President. The Marine Society of Boston, as old seamen, address the President in favor of a navy; the President in reply, thinks a navy is the proper defense of the country.

I believe, gentlemen, in the first part of my charge, I made remarks on the assertions of the traverser, that the President had borrowed money at eight per cent in time of peace. Therefore, it will not be necessary to enlarge on that point.

You will please to notice, gentlemen, that the traverser in his defense must prove every charge he has made to be true; he must prove it to the marrow. If he asserts three things, and proves but one, he fails; if he proves but two, he fails in his defense, for he must prove the whole of his assertions to be true. If he were to prove, that the President had done everything charged against him in the first paragraph of the publication—though he should prove to your satisfaction, that the President had interfered to influence the decisions of a court of justice, that he had delivered up Jonathan Robbins without precedent, against law and against mercy, this would not be sufficient, unless he proved at the same time, that Jonathan Robbins was a native American, and had been forcibly impressed, and compelled to serve on board of a British ship of war. If he fails, therefore, gentlemen, in this proof, you must then consider whether his intention in making these charges against the President were malicious or not. It is not necessary for me to go more minutely into an investigation of the defense. You must judge for yourselves—you must find the publication, and judge of the intent with which that publication was made, whether it was malice or not? If you believe that he has published it without malice, or an intent to defame the President of the

United States, you must acquit him; if he has proved the truth of the facts asserted by him, you must find him not guilty.

THE VERDICT AND SENTENCE.

The *Jury* retired and returned with a verdict of *Guilty.*

JUDGE CHASE. Mr. Cooper, as the jury have found you guilty, we wish to hear any circumstances you have to offer in point of the mitigation of the fine the court may think proper to impose on you, and also in extenuation of your punishment. We should therefore wish to know your situation in life, in regard to your circumstances. It will be proper for you to consider of this: as you are under recognizance, you will attend the court some time the latter end of the week—(the court appointed Wednesday).

April 30.

JUDGE CHASE. Mr. Cooper, have you anything to offer to the court previous to passing sentence?

Mr. Cooper. The court have desired me to offer anything relating to my circumstances in mitigation of the fine, or any observation that occurs to me in extenuation of the offense. I have thought it my duty (not for the purpose of deprecating any punishment which the court may deem it proper to inflict, but) to prevent any accidental or apparent harshness of punishment on part of the court, for want of that information which it is in my power to give. For this reason, therefore, and that the court may not be misled, I think it right to say, that my property in this country is moderate. That some resources I had in England, commercial failures there have lately cut off: that I depend practically on my practice: that practice, imprisonment will annihilate. Be it so. I have been accustomed to make sacrifices to opinion, and I can make this. As to circumstances in extenuation, not being conscious that I have set down aught in malice, I have nothing to extenuate.

JUDGE CHASE. I have heard what you have to say. I am

sorry you did not think proper to make an affidavit in regard to your circumstances; you are a perfect stranger to the court, to me at least. I do not know you personally—I know nothing of you, more than having lately heard your name mentioned in some publication. Every person knows the political disputes which have existed amongst us. It is notorious that there are two parties in the country; you have stated this yourself. You have taken one side—we do not pretend to say, that you have not a right to express your sentiments, only taking care not to injure the characters of those to whom you are opposed.

Your circumstances ought to have been disclosed, on affidavit, that the court might have judged as to the amount of the offense; nor did we want to hurt you, by this open disclosure.

Mr. Cooper. I have nothing to disclose that I am ashamed of.

JUDGE CHASE. If we were to indulge our own ideas, there is room to suspect that in cases of this kind, where one party is against the government, gentlemen, who write for that party, would be indemnified against any pecuniary loss; and that the party would pay any fine which might be imposed on the person convicted. You must know, I suppose, before you made any publication of this kind, whether you were to be supported by a party or not, and whether you would not be indemnified against any pecuniary loss. If the fine were only to fall on yourself, I would consider your circumstances; but, if I could believe you were supported by a party inimical to the government, and that they were to pay the fine, not you, I would go to the utmost extent of the power of the court. I understand you have a family, but you have not thought proper to state that to the court. From what I can gather from you, it appears that you depend on your profession for support; we do not wish to impose so rigorous a fine as to be beyond a person's abilities to support, but the government must be secured against these malicious attacks. You say that you are not conscious of having acted from malicious motives. It may be so; saying so, we must believe

you; but, the jury have found otherwise. You are a gentleman of the profession, of such capacity and knowledge, as to have it more in your power to mislead the ignorant. I do not want to oppress, but I will restrain, as far as I can, all such licentious attacks on the government of the country.

Mr. Cooper. I have been asked by the court whether, in case of a fine being imposed upon me, I shall be supported by a party. Sir, I solemnly aver, that throughout my life, here and elsewhere, among all the political questions in which I have been concerned, I have never so far demeaned myself as to be a party writer. I never was in the pay or under the support of any party; there is no party in this, or any other country, that can offer me a temptation to prostitute my pen. If there are any persons here who are acquainted with what I have published, they must feel and be satisfied that I have had higher and better motives, than a party could suggest. I have written, to the best of my ability, what I seriously thought would conduce to the general good of mankind. The exertions of my talents, such as they are, have been unbought, and so they shall continue; they have indeed been paid for, but they have been paid for by myself, and by myself only, and sometimes dearly. The public is my debtor, and what I have paid or suffered for them, if my duty should again call upon me to write or to act, I shall again most readily submit to. I do not pretend to have no party opinions, to have no predilection for particular descriptions of men or of measures; but I do not act upon minor considerations; I belong here, as in my former country, to the great party of mankind. With regard to any offers which may have been made to me, to enable me to discharge the fine which may be imposed, I will state candidly to the court what has passed, for I wish not to conceal the truth; I have had no previous communication or promise whatever, I have since had no specific promises of money or anything else. I wrote from my own suggestions. But, many of my friends have, in the expectation of a verdict against me, come forward with general offers of pecuniary assistance; these

offers, I have hitherto, neither accepted nor rejected. If the court should impose a fine beyond my ability to pay, I shall accept them without hesitation; but if the fine be within my circumstances to discharge, I shall pay it myself. But the insinuations of the court are ill founded, and if you, sir, from misapprehension or misinformation have been tempted to make them, your mistake should be corrected.

JUDGE PETERS. I think we have nothing to do with parties; we are only to consider the subject before us. I wish you had thought proper to make an affidavit of your property. I have nothing to do sitting here to inquire whether a party in whose favor you may be, or you, are to pay the fine. I shall only consider your circumstances and impose a fine which I think adequate; we ought to avoid any oppression. It appears that you depend chiefly upon your profession for your support. Imprisonment for any time would increase the fine, as your family would be deprived of your professional abilities to maintain them.

JUDGE CHASE. We will take time to consider this. Mr. Cooper, you may attend here again.

May 1.

The COURT sentenced Mr. Cooper to pay a fine of four hundred dollars; to be imprisoned for six months, and at the end of that period to find surety for his good behavior, himself in a thousand and two sureties in five hundred dollars each.

Mr. Cooper's defense, which was so written out by himself as to make up a review of the whole administration, attracted great attention, and his imprisonment for an offense thought so trivial, was a popular subject for electioneering declamation. President Adams himself thought the thing had gone too far and would have pardoned him had not Mr. Cooper issued a letter in which he told him that so far from asking for clemency he would not accept it unless coupled with an acknowledgement by the President of the breach of good faith which the publication of the alleged provacatory letter involved. Of course, nothing could be done but let the imprisonment run out. This it did and the fine was paid. Forty years afterwards at the same time with that imposed upon Lyon (see 6 Am. St. Tr., 687), it was repaid with interest. Wharton's State Trials, p. 679.

THE TRIAL OF JAMES THOMPSON CALLENDER FOR SEDITIOUS LIBEL, RICHMOND, VIRGINIA, 1800.

THE NARRATIVE.

This was the last of the great trials under the Federal Sedition Act,[a] and the most celebrated. The libel was directed against the President of the United States, and the tempest which the trial excited, says Dr. Wharton, can now hardly be understood. Virginia had joined Kentucky in declaring the law void within her borders, as a menace to the freedom of the press, and a breach of the liberties guaranteed by the Constitution. There was no popular sympathy for Callender,[b] who was a brilliant, drunken, unscrupu-

[a] See Trial of Matthew Lyon, 6 Am. St. Tr., 687.
Trial of Anthony Haswell, 6 Am. St. Tr., 695.
Trial of Thomas Cooper, *ante*, p. 774.

[b] "JAMES THOMPSON CALLENDER was a Scotchman of whom nothing good is known. He had the pen of a ready writer and the brazen forehead of a knave. In Scotland he wrote a pamphlet which he called 'The Political Progress of Great Britain,' was driven from the country, fled to the United States, where, like Freneau, like Duane, like John Wood, like every man, who, for a few shillings, would laud France and slander the administration, he was taken up and helped by Jefferson. He became, in short, what might be called a Jeffersonian hack. His business was to gather all the political scandal, all the foul abuse, all the libels, all the mean lies that circulated through the press, to distort Congressional speeches, to misinterpret good acts, to attribute false motives, to digest the scurrility of the Aurpra, of the Argus, of the Independent Chronicle, and once a year send out the whole mass in the form of a book." McMaster, Vol. 2, p. 468. "Callender belonged to a class of men long common in England, but till he arrived little known in the United States. He was a fine specimen of a Grub-street hack. As destitute of principle as of money, his talents, which were not despicable, were ever up for sale. The question with him was never what he wrote, but what he was to be

lous literary hack, whose scurrilous pen was at the service of the highest bidder. To read his book, "The Prospect Before Us," and say the writer was not guilty of sedition was impossible; but what became of Callender was of little consequence, as every one knew the real contest would be between the Republican lawyers of the Virginia bar and Judge Samuel Chase, the most reckless, the most partisan, the most fearless judge on the bench of the Circuit Court. Long before the trial opened statements were made and sworn to that Chase had spoken his threats of what he would do; that he had commanded the marshal to see to it that none of the rascals called Democrats were put on the jury, and that in the presence of a great company he had shown how he would draw the best lawyers of Virginia across his knees and flog them out of their nullifying mood.

paid for his writing. It ceases to be surprising, therefore, that having begun his career in America by villifying Washington, he should, before he sank out of sight in the waters of the James River, have turned upon his old employers and loaded Jefferson with calumny and abuse." McMaster, Vol. 2, p. 468. "Mr. Jefferson, as soon as he became President, exercised his powers of pardon in favor of Callender, as well as all others, who had been convicted under the Sedition Law, and were then undergoing sentence of imprisonment. A little later he asked to be appointed Postmaster at Richmond, which was refused him. He took great offense at the refusal, and soon began writing in opposition to the new administration; and he openly justified his desertion, on the ground of ill-treatment he had received from Mr. Jefferson. He was of course welcomed by the new allies, and having connected himself with the editor of an obscure journal, recently established in Richmond (the Recorder), he poured forth against the Republican party generally, and Mr. Jefferson in particular, a torrent of scurrility and slander of which no example had been previously afforded in the United States, not even by himself. The private life of Mr. Jefferson, present and past, was the subject of the closest scrutiny; and, wherever he was believed to be vulnerable, no matter for what cause, or upon what evidence, he was unhesitatingly assailed in the grossest and most offensive way. . . . It remains to be added that, while this wretched libeller, who had now become an habitual sot, was disseminating his slanders and ribaldry with untiring virulence, he was one morning found drowned in the James River, where he had been bathing, it was supposed, in a state of intoxication." Tucker's Life of Jefferson, Vol. 2, p. 120.

And the reckless conduct of Judge Chase in the court room can only be explained by his knowledge that it was to be a struggle to the death between himself and the distinguished lawyers which Virginia had sent against him: Edmund Randolph, George Hay, William Wirt, and Philip Nicholas.

No mention was made in the indictment of the book "The Prospect Before Us." A few sentences, by no means the bitterest that could be found, were chosen, and upon them the case was based. The reign of Mr. Adams, Callender wrote, had been one continued tempest of malignant passion. Never since taking his seat in the Presidential chair, had he opened his lips or lifted his pen, but scolding or threatening followed. He had exasperated the rage of contending parties, he had caluminated and destroyed every man who had differed from him in his opinions, he had driven from office everybody who would not vote as he wished, and he was besides, a professed aristocrat.

The case opened with the usual plea for time, which was granted. The lawyers then prepared a trap for the judge. They presented an affidavit from Callender that he must have still more time, in fact until the next term. The witnesses on whose testimony he relied to prove the truth of his statements could not be assembled in a few weeks. The paper then gave a list of witnesses scattered over the face of the country. He must have William Gardner who lived at Portsmouth, and Judge Bee, who lived in South Carolina, and Tench Coxe and Timothy Pickering, who were at Philadelphia, and General Blackburn, from Bath county, Virginia, and William B. Giles, of Amelia county, in the same state. Great stress was laid on the testimony of Giles, and the Court put off the trial for a few days; and when the case was again called the lawyers for the defense declared they did not think Giles would come, and had the boldness to claim that, as the Court had consented to a delay in the hope that Giles would come, the judge had by so doing admitted the extreme importance of that witness and ought, therefore, to put off the trial till Giles did come.

Then Chase grew angry and, as he would have said, took the lawyers in hand. When Mr. Hay argued that Giles' evidence would help to determine whether Callender's pamphlet consisted of libelous statements or merely questions of opinion, which things would have to be considered by the jury in assessing the fine; "That is a wild notion; it is not the law," thundered the Judge, and ordered the jury to be empannelled and the trial to proceed. Mr. Nicholas having challenged the entire panel of jurors, he was flouted and routed with a finality that not only overruled his objections, but cast serious aspersions on his legal attainments. Mr. Hay then proposed to examine the jurors individually as to any prejudices they might entertain against the accused. No questions could be asked the jurors, answered Chase, save such as were first reduced to writing and submitted for the approval of the court, and when the attorneys finally submitted written questions for the jurors, their interrogatories were declared improper and rejected forthwith. According to the court, it did not make any difference if a talesman had read and formed an unfavorable opinion of "The Prospect Before Us;" he was still eligible for the jury provided he had not formed an opinion concerning the charge on which the prisoner was indicted, and as none of the candidates had read the indictment, they were all qualified to serve on the case. The Virginian lawyers now abandoned all hope of securing an impartial jury, for when one of the talesmen named Basset volunteered the information that he had read Callender's tract and had formed a positive opinion that it came under the Sedition Law, they failed to record any objection to his retention.

The authorship was easily established by the testimony of the printers who had put the manuscript into type and the booksellers who had sold it as a pamphlet, and when Mr. Hay protested that those men could not be compelled to answer the questions put to them, they being accomplices equally guilty under the law, and privileged from testifying against themselves, the court not only overruled

his objections, but virtually promised the hesitating witnesses immunity as a reward for their confessions.

Having proved that the prisoner was the author of "The Prospect Before Us," the prosecution next introduced the whole pamphlet in evidence. The defense protested, claiming that only those portions of the document which were recited in the indictment could be considered by the jury, especially in view of the court's decision that the jurors were concerned only with the offense charged in the official papers and were not disqualified by their prejudices against the pamphlet as a whole. The prisoner, retorted the Judge, was being tried for writing "The Prospect Before Us," and he was not to escape punishment because only mild selections from it appeared in the indictment. A little informality of that sort was best rectified by allowing the jury to read the whole pernicious production.

The prosecution ended here and the defense was instructed to proceed. The counsel for the prisoner to prove the truth of its statements, called a well-known citizen, Colonel Taylor, to the stand. The Judge interrupted, declaring that every question put to him must be first examined and approved by the court, and that he would admit no testimony that did not prove the truth of the whole paragraph complained of in the indictment. They protested that one witness might prove the correctness of one statement in the pamphlet, and another another, and that no one individual could be expected to substantiate the whole of it. Contemptuously referred to as "you young gentlemen," and goaded by every public slight and sneer which brutal authority could inflict upon them, the three lawyers, nevertheless, stood their ground, insisting that the rulings of the court were equivalent to a complete denial of justice, and virtually defying the bench. Finally, the judge made a pretense of requesting the District Attorney to allow the questions upon which "the young gentlemen were so insistent," but he declined.

The defense had no recourse but to address the jury and

endeavor to take advantage of the existing prejudice against the Sedition Law. But when Mr. Wirt began to argue against the constitutionality of the law, Chase ordered him to his seat, and he quietly obeyed.

"Hear my words!" shouted the Judge. "I wish the world to know them! My opinion is the result of mature deliberation!"

But Chase had no sooner concluded his pompous proclamation than Mr. Wirt once more turned to the jury, and, quoting directly from the third section of the Sedition Act, which provided that the jury "should determine the law and the fact under the direction of the court, as in other cases," calmly proceeded to discuss the forbidden subject. The Constitution was the law, he declared, and as the jury had the right to determine the law, they had logically the right to consider the Constitution.

"A non sequitur, sir!" shouted Chase, whereupon Wirt sat down and Nicholas took up the same line of argument until he was virtually smothered by interruptions from the bench. Then Hay resumed the attack, but by this time the judge had worked himself into a fury, and the senior counsel, flatly contradicted, badgered, and insulted almost every time he opened his lips, suddenly brought the unseemly contest to a close by taking his seat and gathering up his papers.

"Please to proceed, sir," requested the Judge, "and be assured that you will not again be interrupted by me. Say what you will." The senior counsel, however, vouchsafed no response to these advances. "I think it right to interrupt counsel when mistaken in the law," he protested. "Yet I do not mean to interrupt improperly. There is no reason to be captious."

Finally, as the counsel left the court room, he half rose from his chair, and roaring, "As you please, sirs!" turned to the jury and began a long and careful charge.

Two hours later a verdict of guilty was recorded, and the prisoner sentenced to nine months' imprisonment and

a fine of two hundred dollars, and required to find sureties for good behavior for a period of two years.

Five years later Chase was impeached before the Senate of the United States for oppressive and vexatious conduct during the trial, and indecent solicitude for the conviction of the accused.[c]

THE TRIAL.[1]

In the United States Circuit Court, District of Virginia, Richmond. June, 1800.

HON. SAMUEL CHASE,[2]
HON. CYRUS GRIFFIN,[3] *Judges.*

May 28.

James Thompson Callender had been indicted under the sedition law by a grand jury for a seditious libel upon John Adams, President of the United States.

The matter set out in the indictment as libellous was as follows:

"The reign of Mr. Adams has been one continued tempest of malignant passions. As President, he has never opened his lips, or lifted his pen without threatening and scolding; the grand object of his administration has been to exasperate the rage of contending parties, to caluminate and destroy every man who differs from his opinions. Mr. Adams has labored, and with melancholy success, to break up the bonds of social affection, and under the ruins of confidence and friendship, to extinguish the only gleam of happiness that glimmers through the dark and despicable farce of life.

"The contriver of this peace has been suddenly converted, as he said, to the presidential system, that is to a French war, an American navy, a large standing army, an additional load of taxes, and all the other symptoms and consequences of debt and despotism.

[c] This narrative is taken from Mr. Hill's Decisive Battles of the Law.

[1] *Bibliography.* Wharton's State Trials. See *ante,* p. 778.

[2] See *ante,* p. 778.

[3] GRIFFIN, CYRUS. (1749-1810.) Born in Virginia and educated in England; Member of Legislature; Member of Congress, 1778, 1781, 1787; President of Congress, 1788; President Federal Court of Admiralty Appeals from its creation until its abolition; Commissioner to Creek Nation, 1789; United States District Judge, 1789-1910. Died Yorktown, Va.

The same system of persecution has been extended all over the continent, every person holding an office must either quit it, or think and vote exactly with Mr. Adams. Adams and Washington have since been shaping a series of these paper jobbers into judges and ambassadors, as their whole courage lies in want of shame; these poltroons, without risking a manly and intelligible defense of their own measures, raise and affected yelp against the corruption of the French Directory, as if any corruption would be more venal, more notorious, more execrated than their own. The object with Mr. Adams was to recommend a French war, professedly for the sake of supporting American commerce, but in reality for the sake of yoking us into an alliance with the British tyrant. While such numbers of the effective agents of the revolution languish in obscurity, or shiver in want, ask Mr. Adams whether it was proper to heap so many myriads of dollars upon William Smith, upon a paper jobber, who, next to Hamilton and himself is, perhaps, the most detested character on the continent. You will then make your choice between innocence and guilt, between freedom and slavery, between paradise and perdition; you will choose between the man who has deserted and reversed all his principles, and that man whose own example strengthens all his laws, that man whose predictions, like those of Henry, have been converted into history. You will choose between that man whose life is unspotted by a crime, and that man whose hands are reeking with the blood of the poor, friendless Connecticut sailor. I see the tear of indignation starting on your cheeks! you anticipate the name of John Adams. Every feature in the conduct of Mr. Adams, forms a distinct and additional evidence, that he was determined at all events to embroil this country with France. Mr. Adams has only completed the scene of ignominy which Mr. Washington began.—This last presidential felony will be buried by Congress in the same criminal silence as its predecessors. Foremost in whatever is detestable, Mr. Adams feels anxiety to curb the frontier population. He was a professed aristocrat; he had proved faithful and serviceable to the British interest. Thus we see the genuine character of the President, when but in a secondary station, he censured the funding system, when at the head of affairs, he reverses all his former principles. He exerts himself to plunge his country into the most expensive and ruinous establishments. In the two first years of his presidency, he has contrived pretenses to double the annual expense of government by useless fleets, armies, sinecures and jobs of every possible description. By sending these ambassadors to Paris, Mr. Adams and his British faction designed to do nothing but mischief. In that paper with all the cowardly insolence arising from his assurance of personal safety, with all the fury, but without the propriety or sublimity of Homer's Achilles, this hoary headed incendiary, this libeller of the governor of Virginia, bawls out to arms! then to arms! It was floating upon the same bladder of popularity that Mr. Adams threatened to make this city the centrical point of a bonfire.

"Reader, dost thou envy that unfortunate old man with his twen-

ty-five thousand dollars a year, with the petty parade of his birthday, with the importance of his name sticking in every other page of the statute book. Alas! he is not an object of envy, but of compassion and of horror. With Connecticut more than half undeceived, with Pennsylvania disgusted, with Virginia alarmed, with Kentucky holding him in defiance, having renounced all his original principles, and affronted all his honest friends, he cannot enjoy the sweet slumbers of innocence, he cannot hope to feel the most exquisitely delightful sensation that ever warmed a human breast, the consciousness of being universally and deservedly beloved.—It is happy for Mr. Adams himself, as well as for his country, that he asserted an untruth. In the midst of such a scene of profligacy and of usury the President has persisted as long as he durst, in making his utmost efforts for provoking a French war. For although Mr. Adams were to make a treaty with France, yet such is the grossness of his prejudice, and so great is the violence of his passions, that under his administration America would be in constant danger of a second quarrel. When a chief magistrate, both in his speeches and newspapers, is constantly reviling France he can neither expect or desire to live long in peace with her. Take your choice then between Adams, war and beggary, and Jefferson, peace and competency."

The prisoner pleaded *not guilty.*

Hugh Nelson,[4] United States District Attorney, for the United States.

Philip N. Nicholas,[5] *George Hay*[6] and *William Wirt,*[7] for the prisoner.

[4] NELSON, HUGH. (1768-1836.) Born in Virginia; Speaker House of Delegates; Judge General Court; Presidential elector; Representative in Congress, 1811-1823; Minister to Spain. Died Albermarle County, Virginia.

[5] NICHOLAS, PHILIP NORBORNER. (1773-1849.) Born in Williamsburg; was admitted to the Bar at an early age and at 21 was Attorney General of Virginia; President Farmers Bank for many years; Judge of Virginia General Court, 1823-1849.

[6] HAY, GEORGE. Member Virginia Legislature; United States District Attorney; United States District Judge; married a daughter of President Munroe and was the author of "Treatise on the Usury Laws," "Life of John Thompson," "Treatise on Expatriation." Died Richmond, Va., 1830.

[7] WIRT, WILLIAM. (1772-1834.) Born Bladensburg, Md. Chancellor Eastern District of Virginia, 1802; United States District Attorney, 1816; Attorney General of the United States, 1817-1829. Removed to Baltimore and engaged in literature; author of "The British Spy," "The Old Bachelor," "Life of Patrick Henry." Died in Washington.

Mr. Nicholas presented an affidavit made by the prisoner and moved for a continuance. The affidavit alleged that the following persons are material witnesses in his defense, viz.: William Gardner of Portsmouth; Tench Coxe of Philadelphia; Judge Bee of South Carolina; Timothy Pickering late of Philadelphia; William B. Giles of the County of Amelia; Gen Blackburn of the County of Bath. That he expects to prove by the said William Gardner he was Commissioner of Loans for the State of New Hampshire, under the government of the United States, and that he was turned out of the said office of Commissioner of Loans because he, said Gardner, refused to subscribe an address circulated in the town of Portsmouth, in New Hampshire, and presented to the President of the United States in the year 1798, at the instance of several inhabitants of the said town, in which address unequivocal approbation of the conduct of the said President, in the administration of the United States is expressed. That he expects to prove by the evidence of Tench Coxe, that he, in the year 1798, held an important office, to-wit: Commissioner of the Revenue, from which office the said Coxe was ejected by the present President of the United States, because he did not approve the measures of his the said President's administration, or the principles on which it was conducted. That he verily expects to prove by Judge Bee that he did receive from the President of the United States, in the year 1799, a letter, in which he the said President did advise and request the said Judge Bee, then acting in his judicial character, to deliver to the Consul of the British nation in Charleston, Jonathan Robbins, alias Thomas Nash, who had been apprehended and carried before the said Judge on a charge of murder committed on the high seas, on board the British frigate Hermione. That he shall be able to prove, by the evidence of Timothy Pickering, that the President of the United States was in possession of dispatches from Mr. Vans Murray, American Minister in Holland, containing assurances on the part of the French Republic that Ambassadors from the United States would be received in a way satisfactory to the people and government of the United States, many weeks while Congress was in session, before he communicated the same to Congress. That he believes that he shall be able to prove by the evidence of Stephen Thompson Mason and William B. Giles, that John Adams, President of the United States, has unequivocally avowed, in conversation with them, principles utterly incompatible with the principles of the present Constitution of the United States; principles which could not be carried into operation under any political institution wthout the establishment of a direct, powerful, and dangerous aristocracy; that he declared, in express terms, to the said Stephen Thompson Mason, that he had no more idea that the present Federal Constitution could, for any length of time, control the people of the United States, than that it could control the motion of the planets; that he also declared to the said Stephen Thompson Mason, that he had no more idea that a political society could exist without a distinction of ranks, than that an army could exist without officers;

and also that he can prove, by the said William B. Giles, that the President of the United States has avowed, in conversation with him, a sentiment to this effect, that he thought the executive department of the United States ought to be vested with power to direct and control the public will.

That he believes he shall be able to prove, by General Blackburn, that he did receive an address from John Adams, President of the United States, in answer to the field officers of Bath County, in which the said President does avow that there was a party in Virginia which deserved to be humbled into dust and ashes before the indignant frowns of their injured, insulted, and offended country. That he is advised and believes that it is material to his defense against the indictment aforesaid, that he should procure authentic copies of sundry answers made by the President of the United States to addresses from the inhabitants of the United States, in various parts thereof, which authentic copies he cannot procure, so as to be in readiness for trial during the present term. That he is advised and doth believe, that a certain book, entitled "An Essay on Canon and Feudal Law," or entitled in words to that purport, ascribed to the President of the United States, and of which he believes the President is the author, is material to his defense, and that he cannot procure a copy of the same, and evidence that the said President is the author thereof, without being allowed several weeks, and perhaps months, for the purpose. That he is told by the counsel who mean to appear for him, that they cannot possibly be prepared to investigate the evidence relating to the several charges in the indictment, even if all the persons and documents wanted were upon the spot.

The COURT granted a postponement till the ensuing Monday.

June 2.

Mr. Hay asked a postponement for a few hours until it could be ascertained whether Mr. Giles would attend or not. The badness of the weather on the preceding day, it was suggested, had probably prevented his arrival in town as early as might otherwise have been expected.

June 3.

A motion for a postponement until November was renewed by *Mr. Hay*. He said that Mr. Giles had not arrived, and that he did not then expect him. Mr. Giles would, probably, presume that the indictment was either tried or continued to the day to which he was summoned, and as he had not come on that day he could not be expected at

all. The Court had declared the evidence of Mr. Giles to be material, not only in express terms, but by a partial postponement, and inferred that the trial ought not to take place until his personal attendance could be procured.

Mr. Hay then asked the attention of the Court to other reasons, which satisfied his own mind, that the motion ought to be granted.

The laws and customs of the State of Virginia were in favor of the motion. In this State when an indictment for misdemeanor is found, the party is not arrested and brought into court, but a summons issues returnable to the succeeding court. In the interval the party has time to collect and prepare the materials for his defense. It was true, as to himself, that he had long ago formed a determination to appear in behalf of the first man who should be indicted in this State for a libel under the sedition law. He had formed this resolution because he was convinced, after the most mature deliberation, preceded by a calm and temperate investigation of the subject with gentlemen who differed from him in political sentiment, but were of the first characters for talents, that the second section of the sedition law was unconstitutional. But he had never supposed the trial would take place immediately after the prosecution was commenced, and therefore, though he was ready to discuss the question concerning the "rights of the jury to decide the law of the case," and the question concerning the constitutionality of the law, he was not ready to state and to comment on the evidence on which the traverser relied. This had been already asserted to the court. But there was another point worthy of notice. He was not ashamed to acknowledge, he said, that he was but little acquainted with the doctrine of libels. Happily for the repose of people, no instance had occurred in this State which had turned the attention of professional men to that subject. In the little time, therefore, that had elapsed since the traverser had been arrested, he had not had leisure to examine a point which appeared to him to merit some consideration.

The second section of the sedition law made falsehood as well as scandal and malice an essential part of every libel, and by the last sentence the party accused is allowed to show in his justification the truth of the matter charged to be libellous.

He would not pretend to say decidedly what ought to be the construction of that law, but the opinion which he had been able to form after a very short consideration of the subject, was, that the object of the law was to punish a man, not for abuse nor for erroneous deductions or opinions, but for "fact falsely and maliciously asserted." If this idea was correct, it became a matter of consequence to do what had never been done perhaps before, to draw a line of discrimination between fact and opinion; because if the indictment contained against the traverser charges of being guilty of error in opinion as well as falsehood in fact, it was so far defective, and ought not to be regarded in preparing for a defense, or noticed by the jury in assessing the fine.

JUDGE CHASE. You are mistaken in supposing that the jury has a right to assess the fine. It may be conformable to your local State laws, but it is a wild notion as applied to the Federal Court. It is not the law.

Mr. Hay said that he was somewhat perplexed. He could sometimes answer arguments, but not authority; however, if he was permitted to proceed, he would state his ideas about fact and opinion, and then leave the subject to the court. The observations which he was about to make, were hazarded without that deliberation to which he could wish to have recourse. He was not, however, urging an argument, but praying for time to prepare one. It seemed to him, clearly, that the assertion of a fact was the assertion of that which, from its nature, was susceptible of direct and positive evidence; everything else was opinion. For instance, if one man should say of another that he stole a horse, the assertion, if true, could be demonstrated to be true by proving that he did steal a horse; or if one man

said of another that he was a thief, the person making the charge might support it by proving that the party accused had taken property secretly, without the consent or knowledge of the owner. About evidence in a question of this sort, all men of common understanding would form the same opinion. But what sort of evidence would be necessary to prove the first words of the indictment, that the reign of Mr. Adams had been one continued tempest of malignant passions? The circumstances to which the writer might allude, and which satisfied his mind that Mr. Adams was intemperate and passionate, would only prove to a man of different political complexion, that he was under the influence of a patriotic, honest and virtuous sensibility. When Mr. Adams said in his reply to the people of Arlington and Sandgate, "that he had long seen the exertions of dangerous and restless men misleading the understanding of well-meaning citizens, and prompting them to such measures as would sink the glories of America, and prostrate her liberties at the feet of France,"—some might conceive that he was speaking the language of passion and malignity. Many were of that opinion,—he himself was. He did not think that Mr. Adams could point his finger to a single man who deserved a reproach so vile. It was language calculated to exasperate the rage of contending parties. On the other hand, he was willing to admit that there were men of good sense and upright principles who really believe that the President spoke the plain truth, and that they themselves had seen such men as he had described. This was a question of opinion only, and therefore was open to endless discussion.

One instance more completely illustrates his meaning. The indictment charged the traverser with having maliciously asserted, that the President had reversed all his principles. If this assertion could be proved, it would be necessary, first, To show what his principles were; second, What they are now. The first branch of discussion presented difficulties absolutely insurmountable. Men of dif-

ferent political opinions, furnished with the same materials of information, would form conclusions diametrically opposite. Let them take for their guide the vindication of the Constitution of the United States. Many were perfectly satisfied that the President of the United States, instead of approving the Federal Constitution, was of opinion, that a government composed of an hereditary chief magistrate, and Senate, and a House of Commons or representatives, chosen by the people, was better calculated than any other to secure the liberties and promote the happiness of the people. I will avow that I have no doubt that such was the opinion of the President. But others might think, and many had said, that the fair inference was, that he was cordially attached to the principles on which the Constitution of the United States was constructed. What the President's principles had been, therefore, was a question, about which there would forever be a difference of opinion; and if the assertion made by the traverser was not capable of being proved or disproved, the privilege of giving the truth in evidence was a nullity. A jury of one party would not believe it when given; a jury of the other party would not require it to be given.

Now, delay was of great consequence to the traverser. Not only his little property, but his liberty was at stake. He wished to have time to defend himself by counsel who felt competent to the task which they were to perform. As to the United States at large, an immediate trial could be of no sort of consequence, nor can it be of any moment to the party who, it is said, has been libelled. The reputation of the President of the United States must for ever rest on the opinion of a virtuous and intelligent people: and standing on its mighty basis, it could never be affected by the abuse or declamation of an individual, and that individual an obscure and friendless foreigner.

Mr. Nicholas. We conceive that the testimony of Mr. Giles is extremely important; he will prove, as Mr. Callender has stated in his affidavit, that Mr. Adams, the Presi-

dent, wished that the executive had power to control the public will.

This testimony, when compared with the books of the President, will substantiate the charges in the book written by Mr. Callender. It will go strongly to a confirmation of the charges in dispute; it goes directly to that part of the indictment where he is charged with having said that the President is a professed aristocrat. It has been stated that as there are nineteen charges in the indictment against the traverser, though we prove eighteen of them to be true, yet he must be found guilty, because we do not prove the truth of the nineteenth;—but how is it possible for us to defend ourselves, or how can we be prepared for trial, if the witness, by whom we can prove that particular charge, be absent? If the court think that, in order to justify ourselves, we must prove the whole libel to be true, and it shall appear that testimony to prove a particular charge is wanting, the court will afford us an opportunity of adducing it. I conceive, with submission, that the former judgment of the court, in particularly postponing the trial, admitted the evidence of Mr. Giles to be material, and that his personal attendance would be essential to justice.

JUDGE CHASE. Mr. Nicholas has not apprehended the opinion of the court rightly, although on the application of the counsel for the traverser, the court had given them the choice of postponement of the trial till today instead of a few hours; yet it was not meant by that indulgence, either to declare the testimony of Mr. Giles material, or to postpone the trial till another term, on account of his absence.

Mr. Nicholas urged the necessity of postponing the trial till Mr. Giles could attend. The question, on a motion for a continuance is, can the testimony of the absent witness substantiate the defense or the point in issue? How can it be done, if the witness be not present? When a witness, to prove the truth of a particular charge, is absent, I trust the court will give us time to avail ourselves of his evidence, and will not precipitate a trial, when a trial will not demon-

strate that the decision is right; for if the defendant be found guilty when his witnesses are absent, and counsel unprepared, the verdict will not satisfy the public mind of his guilt.

JUDGE CHASE. It is wholly improper to go back to the former motion. Gentlemen, you misapprehend the intention of the court in postponing the cause till today—you ought to confine yourselves to the present motion. Two reasons are assigned for postponing the trial: the first, that Mr. Giles is absent, and it is inferred that the court, by not ruling a trial before, admitted his evidence to be material. The court did not enter into the question whether it be material or not. It appeared that he was within a little distance of this place, and the cause was suspended till Monday, that Mr. Giles might be summoned before that day, to attend. On Monday, you asked for a postponement of the trial for a few hours, and it was stated that perhaps he might come in the course of the day. Instead of a few hours, you had choice of continuing it till today. Mr. Giles has been summoned, and does not attend. Regularly you ought to take out an attachment against him for not attending after having been served with the subpoena and apprised that his evidence was required by the traverser. There is no reason to believe he will be here during the term of the court: you do not expect him; if such excuses as these authorize a postponement of the trial, it must be evident that this cause will never be tried. It is not necessary to say whether Mr. Giles, if present, could be sworn or not; because the traverser is not entitled, on general principles, to a continuance. Another reason assigned is, that as the jury are to assess the fine, it is essenial that the traverser should have the privilege of adducing testimony to mitigate it. This may be the practice in your own state courts. Your own court will be governed by your own laws, but it does not apply to the Federal courts. The jury are not to regulate the fine. It is a mistaken idea; they have nothing to do with it. But it is stated that the coun-

sel are unprepared to defend the traverser. You show yourselves to be men of ability, and there is no difficulty in the cause; but you say that you are not ready to discuss the difference between fact and opinion: that the charges in the indictment are merely opinion, and not facts falsely asserted. Must there be a departure from common sense, to find out a construction favorable to the traverser? This construction admits the publication, but denies its criminality. If the traverser certainly published that defamatory paper, read it and consider it. Can any man of you say that the President is a detestable and criminal man? The traverser charges him with being a murderer and a thief, a despot and a tyrant! Will you call a man a murderer and a thief and excuse yourself by saying it is but mere opinion—or, that you heard so? Any falsehood, however palpable and wicked, may be justified by this species of argument. The question here is, with what intent the traverser published these charges? Are they false, scandalous, and malicious, and published with intent to defame? It is for the jury to say, what was the intent of such imputations, and this is sufficiently obvious. The cause must be tried. I am sworn to do justice between the United States and the prisoner at the bar. I do not dictate to you how you are to defend him, but you must defend every man according to the law; and without intending any disrespect to either of you, I must confine you to what I think the law.

The *Marshal* was ordered to call the jury, which was done.

Mr. Nicholas. We mean to challenge the array and take every advantage which the laws of the country give us. In support of this doctrine I will read a passage from "Trials per Pais." (Here he read the passage.) I believe there is testimony in court to prove that one of the jurors returned by the marshal, has expressed his sentiments hostile to the traverser. It is like a case stated in the books, where a verdict was set aside, because a juryman had previously said that the man accused ought to be hanged, and in that case,

on the second trial, every juryman was called to say whether he had formed any opinion on the subject or not?

JUDGE CHASE. My construction of the law is quite the contrary. I have always seen triers sworn to decide these questions. How is this done in your country. Challenges for favor must be decided by triers. I suppose there must be triers sworn.

Mr. Nicholas. I believe the books lay down this distinction. Challenges to the array are either principal challenges, or challenges for favor—causes for principal challenges are always tried by the court; challenges for favor are always tried by triers.

JUDGE CHASE. Well, sir, your challenge is for favor, because you state the juror to be unfavorable to the traverser.

Mr. Nicholas. This book states it as a cause of principal challenge.

JUDGE CHASE. Show me that book: it is not the best authority. Have you Coke upon Littleton in the house? If I had it we would see the whole doctrine at once. I am persuaded that Coke upon Littleton states that the challenges for favor must be decided by triers. The oath of the triers is laid down there. Challenges to the array are for partiality in the sheriff.

Coke upon Littleton being produced, and the judge having examined it, observed, the case is clear. Principal challenges to the array, or the whole jury at once, is always for partiality in the sheriff, and not in the jurors.

Mr. Nicholas said that the law might perhaps consider the return of a partial juror, as sufficient to ground a challenge to the array, on the principle of partiality in the sheriff, and wished to know if he was correct in this idea of the law.

JUDGE CHASE. No, sir, the law is not so. You must proceed regularly. You may bring in proof if you can, that any juror has delivered his opinion upon that case heretofore; or you may examine the juror himself, upon oath, to this effect. You may do either, but not both; and this alternative offered, you must consider not as a strict right.

The first juror was sworn, and the JUDGE put the following question to him: "Have you ever formed and delivered an opinion upon the charges contained in the indictment?" The juror answered, that he had never seen the indictment, nor heard it read. The JUDGE then said, he must be sworn in chief.

Mr. Hay asked permission to put a question to the juror before he was sworn in chief.

The JUDGE desired to know what sort of a question he meant to put, and told him he must first hear the question, and if he thought it a proper one, it might be put.

Mr. Hay. The question which, with the permission of the court, I meant to have asked, is this: "Have you ever formed and delivered an opinion on the book entitled 'The Prospect Before Us,' from which the charges in the indictment are extracted?"

JUDGE CHASE. That question is improper, and you shall not ask it. The only proper question is, "Have you ever formed and delivered an opinion upon this charge." He must have delivered as well as formed the opinion. Such a question as you propose, would prevent the man from ever being tried—the whole country have heard the case, and very probably formed an opinion. You might mislead men by your ingenuity, and if you were indulged in putting the question, the traverser might never be tried. He has answered that he never saw the indictment, nor heard it read, and if he has neither read nor heard the charges, I am sure he cannot have formed or delivered an opinion on the subject.

Mr. Hay asked, that the indictment might be read to the juror, because, perhaps, when he heard and understood the charges, he would answer, that he had both formed and delivered an opinion upon them.

JUDGE CHASE. The court has already indulged you as far as they could. The answer of the juryman was explicit—they could not go further than they had gone, and counsel ought to be satisfied.

The juryman was then sworn in chief, and the issue was explained, that it must be proved that the traverser wrote or pub-

lished the book—that the charges were false, scandalous and malicious, and that he wrote them with intent to defame, and that if he could prove the charges he must be acquitted. The same question, "whether they had formed and delivered an opinion on the charges against the traverser," was put by the JUDGE, to eight of the other jurymen successively, before they were sworn in chief, and they all answered in the negative.

Mr. Hay said that it was unnecessary to put this question to the other three jurymen, and they were accordingly sworn in chief immediately. The eighth juror, Bassett, answered, when the previous question was put to him, that though he had never read or heard the charges in the indictment, and knew not what the traverser had published, yet he had formed an unequivocal opinion, that such a book as "The Prospect Before Us," came within the sedition law. But no objection was made to him, and he was sworn like the rest.

The *Clerk* read the indictment to the jury, which was in these words:

The grand inquest of the United States of America, in and for Virginia district, upon their respective oaths do present, that James Thompson Callender, late of the district of Virginia, printer, being a person of wicked, depraved, evil disposed, disquiet and turbulent mind and disposition, and falsely and maliciously designing and intending to defame the Presdent of the Unted States, and to bring him into contempt and disrepute, and to excite the hatred of the good people of the United States against him on the first day of February, in the year of our Lord one thousand eight hundred, and of the independence of the United States of America the twenty-fourth, in the Virginia district aforesaid, and within the jurisdiction of this honorable court, did wickedly and maliciously write, print, utter and publish, a false, scandalous, and malicious writing, against the said President of the United States, of the tenor and effect following, that is to say, "the reign of Mr. Adams (meaning John Adams, Esq., President of the United States) has been one continued temptest of malignant passions. As President, he (meaning the said President of the United States) has never opened his (meaning the said President of the United States) lips or lifted his (the said President meaning) pen without threatening and scolding; the grand object of his (meaning the said President of the United States) administration, has been to exasperate the rage of contending parties, to calumniate and destroy every man who differs from his opinions. Mr. Adams (meaning the President of the United States) has labored, and with melancholy success, to break up the bonds of social affection, and under the ruins of confidence and friendship, to extinguish the only gleam of happiness that glimmers through the dark and despicable farce of life."

And also, the following false, scandalous, and malicious words, that is to say, "the contriver of this piece had been suddenly con-

verted, as he said, to the presidential (meaning the said President of the United States) system, that is to a French war, an American navy, a large standing army, an additional load of taxes, and all the other symptoms and consequences of debt and despotism:" and also the false, scandalous, and malicious words, of the tenor and effect following, that is to say, "The same system of persecution has been extended all over the continent, every person holding an office must either quit it, or think and vote exactly with Mr. Adams" (meaning the said President of the United States)—and also the false, scandalous, and malicious words, of the tenor and effect following, that is to say,—"Mr. Adams (the said President meaning) and Washington, have since been shaping a series of these paper jobbers into judges and ambassadors, as their whole courage lies in want of shame; these poltroons, without risking a manly and intelligible defense of their own measures, raise an effected yelp against the corruption of the French Directory, as if any corruption would be more venal, more notorious, more execrated, than their (meaning the said President, and the late General Washington) own;" and also the false, scandalous, and malicious words, of the tenor and effect following, that is to say, "the object with Mr. Adams (meaning the said President of the United States) was to recommend a French war, professedly for the sake of supporting American (meaning of the United States) commerce, but in reality for the sake of yoking us, meaning (the United States of America) into an alliance with the British tyrant." And also the false, scandalous, and malicious words, of the tenor and effect following, that is to say, "while such numbers of the effective agents of the revolution languish in obscurity, or shiver in want, ask Mr. Adams (meaning the said President of the United States) whether it was proper to heap so many myriads of dollars upon William Smith, upon a paper jobber, who, next to Hamilton and himself (meaning the said President of the United States) is perhaps the most detested character on the continent (meaning the United States of America). And also the false, scandalous and malicious words, of the tenor and effect following, "you (meaning the people of the United States) will then make your choice between innocence and guilt, between freedom and slavery, between paradise and perdition; you will chuse between the man who has deserted and reversed all his principles (meaning the said President) and that man whose own example strengthens all his laws, that man, whose predictions, like those of Henry, have been converted into history. You will choose between that man whose life is unspotted by a crime, and that man (meaning the said President of the United States) whose hands are reeking with the blood of the poor, friendless Connecticut sailor; I see the tear of indignation starting on your cheeks! you (meaning the people of the United States) anticipate the name of John Adams" (meaning the said President of the United States). And also the false, scandalous, and malicious words, of the tenor and effect following, that is to say, "Every feature in the conduct of Mr. Adams (meaning the said President of the United States) forms

a distinct and additional evidence that he was determined at all events to embroil this country with France." And also the false, scandalous, and malicious words, of the tenor and effect following, that is to say, "Mr. Adams (meaning the said President of the United States) has only completed the scene of ignominy which Mr. Washington began." And also the false, scandalous, and malicious words of the tenor and effect following, that is to say, "This last presidential (meaning the said President of the United States) felony will be buried by Congress in the said Criminal silence as its predecessors." And also, the words of the false, scandalous, and malicious tenor and effect following, that is to say, "Foremost in whatever is detestable, Mr. Adams (meaning the said President of the United States) feels anxiety to curb the frontier population." And also the false, scandalous, and malicious words of the tenor and effect following, that is to say, "He (meaning the said President of the United States) was a professed aristocrat; he (meaning the said President of the United States) had proved faithful and serviceable to the British interest (inuendo against the interest and welfare of the United States). And also the false, scandalous, and malicious words of the tenor and effect following, that is to say, "Thus we see the genuine character of the President (meaning the said President of the United States) when but in a secondary station, he (meaning the said President of the United States) censured the funding system, when at the head of affairs, he (meaning the said President of the United States) reverses all his former principles. He (meaning the said President of the United States) exerts himself (meaning the said President of the United States) to plunge his (meaning the said President's) country (meaning the United States of America) into the most expensive and ruinous establishments. In the two first years of his (meaning the said President of the United States) presidency, he (meaning the said President of the United States) has contrived pretences to double the annual expense of government, by useless fleets, armies, sinecures, and jobs of every possible description." And also the false, scandalous, and malicious words, of the tenor and effect following, that is to say, "By sending these ambassadors to Paris, Mr. Adams (meaning the said President of the United States) and his (meaning the said President) British faction, designed to do nothing but mischief." And also the false, scandalous, and malicious words, of the tenor and effect following, that is to say, "In that paper, with all the cowardly insolence arising from his (meaning the said President) assurance of personal safety, with all the fury, but without the propriety or sublimity of Homer's Achilles, this hoary headed incendiary (meaning the President of the United States), this libeller (meaning the said President) of the governor of Virginia, bawls out to arms! then to arms! It was floating upon the fame bladder of popularity that Mr. Adams (meaning the said President of the United States) threatened to make this city the centrical point of a bonfire." And also the false, scandalous, and malicious words, of the tenor and effect following, that is to say, "Reader, dost thou envy that unfortunate old man (meaning the said

President of the United States) with his (meaning the said President) twenty-five thousand dollars a year, with the petty parade of his (meaning the said President) birthday, with the importance of his (meaning the said President) name sticking in every other page of the statute book. Alas! he (meaning the said President of the United States) is not an object of envy, but of compassion and of horror. With Connecticut more than half undeceived, with Pennsylvania disgusted, with Virginia alarmed, with Kentucky holding him (meaning the said President) in defiance, having renounced all his original principles [meaning the said President of the United States] and affronted all his [meaning the said President] honest friends, he [meaning the said President of the United States] cannot enjoy the sweet slumbers of innocence, he [meaning the said President of the United States] cannot hope to feel the most exquisitely delightful sensation that ever warmed a human breast, the conscientiousness of being universally and deservedly beloved."————And also the false, scandalous, and malicious words, of the tenor and effect following, that is to say, "It is happy for Mr. Adams himself [meaning the said President] as well as for his [meaning the said President] country, that he [meaning the said President of the United States] asserted an untruth." And also the false, scandalous, and malicious words, of the tenor and effect following, that is to say, "In the midst of such a scene of profligacy, and of usury the President [meaning the said President of the United States] has persisted as long as he durst [meaning the said President] in making his [meaning the said President] utmost efforts for provoking a French war." And also the false, scandalous, and malicious words, of the tenor and effect following, that is to say, "For although Mr. Adams [meaning the said President of the United States] were to make a treaty with France, yet such is the grossness of his [meaning the said President] prejudice, and so great is the violence of his [meaning the said President] passions, that under his [meaning the said President's] administration, America, [meaning the United States of America] would be in constant danger of a second quarrel." And also the false, scandalous, and malicious words of the tenor and effect following, that is to say,—"When a chief magistrate [meaning the said President of the United States] is, both in his [meaning the said President] speeches, and [meaning the said President] newspapers, constantly reviling France, he [meaning the said President] can neither expect or desire to live long in peace with her. Take your choice then between Adams [meaning the said President], war and beggary, and Jefferson, peace and competency." To the great scandal of the President of the United States, to the evil and pernicious examples of all others, in the like case offending, against the form of the act of Congress of the United States, in such case made and provided, and against the peace and dignity of the said United States of America.

And the grand inquest aforesaid, upon their respective oaths do further present, that the said James Thompson Callender, on the said 1st day of February, in the same year of our Lord 1800, and of

the independence of America the twenty-fourth, designing and intending to defame the President of the United States, and to bring him into contempt and disrepute, and to excite the hatred of the good people against him, in the district aforesaid, and within the jurisdiction of this court, wickedly and maliciously did cause, or procure to be printed and published, a false, scandalous, and malicious writing, against the said President of the United States, of the tenor and effect following, that is to say, "the reign of Mr. Adams (meaning John Adams, Esquire, President of the United States) has hitherto been one continual tempest of malignant passions, as President, he (meaning the said President of the United States) never opened his (meaning the said President of the United States) lips, or lifted his (the said President meaning) pen, without threatening and scolding; the grand object of his (meaning the said President of the United States) administration, has been to exasperate the rage of contending parties, to caluminate and destroy every man who differs from his opinions. Mr. Adams (meaning the said President of the United States) has labored, and with melancholy success, to break up the bonds of social affection, and under the ruins of confidence, of friendship, to extinguish the only beam of happiness that glimmers through the dark and despicable farce of life." And also the following false, scandalous and malicious words, that is to say: "The contriver of this piece had been suddenly converted, as he said, to the presidential (meaning the said President of the United States) system, that is, to a French war, an American navy, a large standing army, an additional load of taxes, and all the other symptoms and consequences of debt and despotism." And also the false, scandalous, and malicious words, of the tenor and effect following, that is to say: "The same system of perfection has been extended all over the continent, every person holding an office, must either quit it, or think and vote exactly with Mr. Adams" (meaning the said President of the United States). And also the false, scandalous, and malicious words, of the tenor and effect following, that is to say:—"Mr. Adams (the said President meaning) and Washington, have since been shaping a series of these paper jobbers into judges and ambassadors: as their whole courage lies in want of shame, these poltroons, without risking a manly and intelligible defense of their own measure, raised an affected yelp against the corruption of the French directory, as if any corruption could be more venal, more notorious, more execrated than their (meaning the said President and the late general Washington) own." And also the false, scandalous, and malicious words, of the tenor and effect, following, that is to say:—"The object with which Mr. Adams (meaning the said President of the United States) was to recommend a French war, professedly for the sake of supporting Ameriacn (meaning the said United States) commerce, but in reality for the sake of yoking us (meaning the United States of America) into an alliance with the British tyrant." And also the false, scandalous, and malicious words, of the tenor and effect following, that is to say: "While such numbers of the effective agents of the evolution languish in

obscurity or shine in want, ask Mr. Adams (meaning the said President of the United States) whether it was proper to heap so many myriads of dollars upon William Smith, upon a paper jobber, who next to Hamilton and himself (meaning the said President of the United States) is perhaps the most detested character on the continent" (meaning the United States of America). And also the false, scandalous and malicious words of the tenor and effect following: "You (meaning the people of the United States) will then take your choice between innocence and guilt; between freedom and slavery—between paradise and perdition. You will then chuse between the man who has deserted and reversed all his principles (meaning the said President) and that man whose own examples strengthen all his laws—that man, whose predictions, like those of Henry, have been converted into history. You will chuse between that man whose life is unspotted by a crime, and that man (meaning the said President of the United States) whose hands are reeking with the blood of the poor, friendless Connecticut sailor. I see the tear of indignation standing on your cheeks! You (meaning the people of the United States) anticipate the name of John Adams (meaning the said President of the United States)." And also the false, scandalous and malicious words of the tenor and effect following, that is to say, "every feature of the conduct of Mr. Adams (meaning the said President of the United States) forms a distinct and additional evidence, that he was determined at all events, to embroil this country with France:" And also the false and scandalous words of the tenor and effect following, that is to say, "Mr. Adams (meaning the said President of the United States) has only completed the scene of ignominy which Mr. Washington began." And also the false, scandalous and malicious words of the tenor and effect following, that is to say, "This last presidential (meaning the said President of the United States) felony will be buried by Congress in the same criminal silence as its predecessors." And also, the words of the false, scandalous and malicious tenor and effect following, that is to say, "Foremost in whatever is detestable, Mr. Adams (meaning the said President of the United States) feels anxiety to curb the frontier population." And also the false, scandalous, and malicious words, of the tenor and effect following, that is to say, "He (meaning the said President of the United States) was a professed aristocrat; he (meaning the said President of the United States) had proved faithful and serviceable to the British interest (inuendo) against the interest and welfare of the United States of America." And also the false, scandalous, and malicious words, of the tenor and effect following, that is to say, "Thus we see the genuine character of the President (meaning the said President of the United States) when in but a secondary station, he (meaning the said President of the United States) censured the funding system, when at the head of affairs, he (meaning the said President of the United States) reverses all his former principles. He [meaning the said President of the United States] exerts himself [meaning the said President of the

United States] to plunge his [meaning the said President's] country [meaning the United States of America], into the most expensive and ruinous establishments. In the two first years of his [meaning the said President of the United States], presidency, he [meannig the said President of the United States] has contrived pretences to double the annual expenses of government, by useless fleets, armies, sinecures, and jobs of every possible description.

And also the false, scandalous and malicious words of the tenor and effect following, that is to say, "By sending these ambassadors to Paris, Mr. Adams [meaning the said President of the. United States] and his [meaning the said President] British faction, designed to do nothing but mischief:" And also the false, scandalous, and malicious words of the tenor and effect following, that is to say, "In that paper, with all the cowardly insolence arising from his [meaning the said President] assurance of personal safety, with all the fury, but without the propriety or sublimity of Homer's Achilles, this hoary headed incendiary [meaning the said President of the United States] this libeller [meaning the said President] of the governor of Virginia, calls out to arms, then to arms! It was floating upon the same bladder of popularity that Mr. Adams (meaning the said President of the United States) threatened to make this city, the centrical point of a bonfire:" And also the false, scandalous and malicious words of the tenor and effect following, that is to say, "Reader, dost thou envy that unfortunate old man (meaning the said President of the United States) with his [meaning the said President] twenty-five thousand dollars a year, with the petty parade of his [meaning the said President] birthday, with the importance of his [meaning the said President] name sticking in every other page of the statute book. Alas! He [meaning the said President of the United States] is not an object of envy, but of compassion and of horror. With Connecticut more than half undeceived, with Pennsylvania disgusted, with Virginia alarmed, with Kentucky holding him [meaning the said President] in defiance, having renounced all his original principles [meaning the said President of the United States] and affronted all his [meaning the said President] honest friends, he [meaning the said President of the United States] cannot enjoy the sweet slumbers of innocence, he [meaning the said President of the United States] cannot hope to feel the most exquisitely delightful sensation that ever warmed a human breast, the consciousness of being universally and deservedly beloved." And also the false, scandalous and malicious words, of the tenor and effect following, that is to say, "it is happy for Mr. Adams himself [meaning the said President] as well as for his [meaning the said President] country, that he [meaning the said President of the United States] asserted an untruth." And also the false, scandalous and malicious words, of tenor and effect following, that is to say: "In the midst of such a scene of profligacy, and of usury, the President [meaning the said President of the United States] has persisted as long as he durst [meaning the said President] in making his [meaning the said President] utmost

efforts for provoking a French war." And also the false, scandalous, and malicious words, of tenor and effect following, that is to say: "For although Mr. Adams [meaning the said President of the United States] were to make a treaty with France, yet such is the grossness of his [meaning the said President] prejudice, and so great is the violence of his [meaning the said President] passions that under his meaning the said President administration, America [meaning the United States of America] would be in constant danger of a second quarrel." Also the false, scandalous and malicious words, of the tenor and effect following, that is to say: "When a chief magistrate [meaning the said President of the United States] is both in his [meaning the said President] speeches and his [meaning the said President] newspapers constantly reviling France, he [meaning the said President] can neither expect or desire to live long in peace with her. Take your choice then, between Adams [meaning the said President] war and beggary, and Jefferson, peace and competency," to the great scandal of the President of the United States, to the evil and pernicious example of all others in the like case offending against the form of the act of the Congress of the United States, in such case made and provided, and against the peace and dignity of the said United States of America.

Mr. Nelson. I shall not attempt, gentlemen of the jury, to excite your passions or inflame your feelings. I shall endeavor to be cautious, and avoid uttering what ought not to be said, which may in any manner influence your judgment, upon your oath; for in that office which I hold, which is that of the people of United America, it is more than a common duty, to take care not to step beyond that line which leads to justice. To that state in which your passions shall be; to such feelings as you shall possess, after hearing the charge contained in the indictment, the evidence in support of it, and a fair statement and representation of the case, I shall leave and entrust the case. In the present state of the business, it will be proper for me to call your attention to the statute or act of Congress which relates to this case.

(Here *Mr. Nelson* read the second and third sections of the sedition law.)

Upon this statute James Thompson Callender is now indicted, and the indictment charges that maliciously designing and intending to defame the President he, James Thompson Callender, did publish the libel set forth therein, with intent to bring him into contempt and disrepute, and to ex-

cite the hatred of the good people of the United States towards him. It will be for you, gentlemen of the jury, in this case to determine whether the traverser has, or has not, been the publisher of this paper. This point being ascertained, it will be for you to consider with what view, and for what purpose, a paper like this has been composed and published.

If you believe it to be a candid and fair discussion of constitutional subjects, of real grievances, or of political opinions and principles generally, you will not consider it to be a libel within the statute. If you believe the facts and allegations averred in the paper are true, you will consider that the traverser hath defended himself according to the statute; but if from internal evidence in the paper itself you do not think so, you do not believe it to be a candid evidence and fair discussion of constitutional subjects, real grievances, or political opinions and principles, and that it does not contain the truth in all parts, you must find the traverser guilty.

You will take the paper into your room with you, and consider it coolly and dispassionately, free, and discharged from all that you may have heard abroad respecting it, and determine in your minds whether it be possible to give it any other construction than that which the indictment has ascribed to it. To me it seems impossible that the extremest ingenuity can show that it was written for any other purpose. However, gentlemen of the jury, to you I submit the calm examination of the paper, upon the paper itself, and this business as to the libel which, or such parts of which, as are charged in the indictment. I shall lay before you, after it shall be proven by witnesses, who will be produced to show that James Thompson Callender, the traverser, did publish this paper; and, in laying it before you, I will make such observations as may seem to me proper and necessary to be made.

Mr. Hay understood that some of the witnesses who are to be examined to prove the guilt of the accused, were themselves, in the estimation of the law, equally guilty; that they have printed, though they had not written the libel in ques-

tion. He would, therefore, beg leave to make it known to those who were in any degree implicated, that they are not bound to accuse themselves, and may withhold, if they think proper, such part of their evidence as has a tendency to criminate themselves.

JUDGE CHASE. This is correct. Every person concerned in the publication is protected by law from compulsion to criminate himself; but, I suppose, if any of them give his evidence, the Government of the United States is pledged not to institute a prosecution against him. Of this he may be assured.

THE EVIDENCE.

Wm. Duval. Saw Mr. Henry Banks have the book called "The Prospect Before Us." Mr. Banks gave me the book to read; the next day saw Mr. Callender, who told me that I must pay him a dollar for the book given him by Mr. Banks; did then pay the dollar for it to Mr. Callender; the book contained some of the charges in the indictment.

Mr. Banks. Some time ago I became a subscriber to the book, "The Prospect Before Us," and paid the money at the time of subscription; lent the book to Major Duval, and informed Mr. Callender that he might get the money for it of Major Duval, and that I could get another copy another time; got from Mr. Callender the copy I delivered to Major Duval; never heard traverser acknowledge that he was the author, but my opinion upon the subject is clear.

The JUDGE said his opinion was no evidence against the traverser.

Wm. Burton. Purchased such a book from Mr. Pleasants (who is a bookseller as well as a printer); paid the money to Mr. Pleasants, and Mr. Callender was present.

Wm. A. Rind. A copy of the book in question belonged to me; a considerable time ago, Mr. Lyon applied to me to print the National Magazine; entered into contract for the purpose of printing twenty-two sheets of that, or an equivalent in other work; after a great part of the magazine had been printed, it stopped, either for the want of paper or some other cause; Mr. Lyon then brought "The Prospect Before Us"; we printed four or five half-sheets of it; the proof sheets were sent to Mr. Callender for correction, and returned corrected in his handwriting. Mr. Callender once corrected a proof sheet in a large room at the office; Mr. Callender came once to hurry the work, and said he would pay, but that he considered Mr. Lyon as paymaster; at Mr. Dixon's office Mr. Callender said he would give him twenty copies if he would read one through, as he was sure it would convert him; a small part of the manuscript remains in my possession; I produce it here in court and believe it to be

the handwriting of Mr. Callender; have seen Mr. Callender write; Mr. Callender once took the debates in the House of Assembly for me.

(The book and manuscript sheets were compared, and found to correspond.)

Meriwether Jones. Had never read the book till after the presentment was made, except a few passages, and perhaps about thirty-three pages; not a word of it was printed at my office, though I sold some of the copies for the benefit of Mr. Callender; I only possessed one copy, and which I found where Mr. Callender generally kept his papers; whenever I sold any of the books, Mr. Callender received the money; I kept a memorandum of the money received that I might know how much I owed him; could not positively say whether Mr. Callender was the author of the book or not; he had never told me he was, though I have my opinion and belief on the subject; had published proposals to print the book, and, afterwards I had them for sale, but do not recollect whether I published that I had them for sale for the benefit of Mr. Callender; though the fact was so; the strongest proof I had of Mr. Callender being the author, was a conversation with him respecting that part of the book where, speaking of Washington and Adams, it used the term poltroons; Mr. Callender said he alluded to some who had received appointments from them, and not to themselves.

Thos. Nicholson. Mr. Callender called at my house to engage me to publish a part of the book; could not do it then; called on me the next day, accompanied by Mr. Meriwether Jones, for whom I was then engaged to print; Mr. Jones told me that I might suspend his work, which I was then engaged in, to do Mr. Callender's; printed seven pages of the book; Mr. Callender paid me for it.

John Dixon. Printed the greatest part of the book (about 120 pages) at the request of Mr. Lyon; Mr. Callender corrected the proof sheet.

Jas. Lyon. Did not know that Mr. Callender was the author of the book, but knew him to be the publisher of it, jointly with myself; probably (but did not recollect certainly), had furnished Mr. Rind with the copy of the book; Mr. Callender corrected the sheets from the press; never saw Mr. Callender writing, but supposed, from having seen the manuscript, and some writing which was (said to be) written by him, that he wrote it.

Samuel Pleasants. Had sold copies of this book; the books were sent to me from the bookbinder, for Mr. Callender; received both the money and the subscription papers for him, and paid him the money received; sold, perhaps, a hundred copies.

Mr. Nelson pointed to the jury the passages in "The Prospect Before Us" corresponding with the charges in the indictment.

Mr. Hay. I conceive that this book cannot be adduced in evidence, in support of the charges stated in the indictment. Perhaps

my stating to the court the reasons which have led me to this conclusion, may subject me to the imputation which has more than once fallen from the bench. It has been the pleasure of the court to observe, that the defense had been conceived and continued in error. What I am about to say will not, perhaps, induce the court to change that opinion. It is with great diffidence I address the court on a subject which I have not had sufficient leisure to investigate. If, unfortunately, my conception of this law be mistaken, I hope I shall be excused, and that the reprimand will not be severe, when it is recollected that I have had not sufficient time for a full examination of the case. The position for which I contend is that the book entitled "The Prospect Before Us" cannot be given in evidence in support of the indictment. The title of the book is not mentioned in the indictment. It states, that "on the first day of February, one thousand eight hundred, the traverser did write, print, utter and publish, a false, scandalous and malicious writing against the President of the United States, of the tenor and effect following: 'The reign of Mr. Adams,' etc." In prosecutions for libels in the English courts, great strictness is observed; the difference of a single letter between the words of the indictment and those in the written or printed paper adduced in evidence, is fatal; and when "tenor and effect" are inserted, all the authorities concur in declaring, that they impose on the prosecutor the necessity of proving the very words in the indictment. The first charge in the indictment is for a libellous writing of the following tenor: "The reign of Mr. Adams has been one continued reign of malignant passions." The book which is introduced in support of this charge begins differently, and contains a hundred other pages, and many pages besides, and is not named in the indictment. The position for which I therefore mean to contend is, that when libellous passages are extracted from a book which has a name by which it can be described, it is the duty of the prosecutor to describe the book by that name; for instance, he ought, in this case, to have stated, that the party accused had published a false, scandalous and malicious writing, entitled "The Prospect Before Us," containing, among other things, the passages complained of. There are two strong reasons to support this doctrine. The first ground on which I rest the validity of this observation is, that the practice has been invariably so. I have taken the trouble of examining fifteen or twenty cases, in all of which the books from which libellous passages were taken, had a name or title, and the prosecutor described every one of them by the name which the author had chosen to give it. From these I will select three cases, to show that the description of the libellous writing by the title given it by the author, has been deemed essentially necessary, the first of which was remarkable for the length of the title; the second, where the paper contained the libel, had a number as well as a title, and both the number and the title were recited. And the third, where the libel was published in the French language, in which case the title, though lengthy, was recited in that language, and then in English. In page 87 of the same book there is a history

given of a prosecution by information against the Chevalier De On, for publishing a libel against the Count de Guerchy, ambassador from France. The prosecution was commenced in the Court of King's Bench. The information states the title, the name of the libel fully and literally, as it was published in French, and then states the translation in English at full length. I bring forward these cases to prove what the practice is; and it is an observation of one of the best judges that ever sat in the King's Bench, Lord Holt, that "the form of pleading is evidence of what the law is."

If, then, it be the practice to recite in the indictment the name, to describe the title of the book, or libel published; if this has been the invariable practice ever since the unhappy prosecutions for libels took place in that country—I believe there is no doubt but the title of this book ought to have been stated in the indictment. I have learned to think with diffidence, but I am firmly persuaded that the attorney for the United States cannot give a single case from the English books of a contrary practice. And with respect to prosecutions in the United States, I know not what the practice may be in the few instances that may have occurred. It appears, too, that substantial reasons, founded on principles of sound law, and sound justice can be adduced in support of this practice. A principle on which I rely to explain this practice to be correct, is, that it is a universal rule of law, that if a man's words, spoken or written, be made the foundation of a charge against him, the whole should be taken together. If the whole writing charged to be libellous, be stated in the indictment, it will be in the power of the defendant to resort to other passages of the same book to explain it. If the defendant were indicted for publishing "The Prospect Before Us," he could resort to other parts of the book for an explanation. It was the duty of the attorney for the United States to have done so; as he has omitted it, he ought to be precluded from producing it in evidence. I will now state the other reason, in support of my objection to the admissibility of this book as evidence. It is founded on this principle which hath always prevailed, or was supposed to prevail in criminal law, that in all criminal cases, the offense should be described with all possible accuracy and precision. In felony, it is necessary to insert in the indictment the goods and chattels alleged to be stolen, as well as the name of the person to whom they belong. The reasons are furnished by the books, why this precision is deemed necessary; the first, that the defendant may know the charge against him, and be able to defend himself; the other, that he may plead the conviction or acquittal in bar of a subsequent prosecution for the same offense. (Hawkins' Pleas of the Crown, page 322).) The defendant is charged with writing and publishing a libel of the following tenor and effect. And but very few passages are selected from the books, which bear but a very little proportion to the extent of the whole of it. I ask, how is the defendant to know whether these few passages were taken from "The Prospect Before Us," or from some newspaper, in which they have been republished by some person, for whose conduct he was not responsible? Unless

the charge be accurately specified, it is impossible for him to defend himself. In support of this indictment, evidence as to either case might be brought forward.

If in the indictment he had been charged with publishing a book, entitled "The Prospect Before Us," he would have known with an absolute certainty and demonstration (by the copy with which he had been furnished), what was meant to be proved against him, and what was necessary for him to prove in his own vindication; as this is not the case, and as he was not bound to know whether the passages were taken from the book or a newspaper, containing extracts from it, in the publication of which he had no concern, and for which he is under no responsibility, he ought to be sheltered by law from this evidence, which is attempted to be introduced against him. The second reason has made a great impression on my mind, and yet retains its influence. I conceive, that one writing against the President, containing fifty libellous passages, if published at the same time, can be but one act, and if there be but one act, there can be but one prosecution; if the present indictment had mentioned the title of the book, and the very passages relied on as parts of this book, the decision of this jury and this court which is about to be pronounced in this case, might be pleaded in bar to any subsequent indictment, for the same or any other passages in the same book. It is no argument to say, that there will be no subsequent prosecution; in times like these, it is impossible to predict what may be attempted, and if such a prosecution were to take place, I should not be more surprised than I am at present. If the title of the book had been inserted in this indictment, and a subsequent indictment were to be brought forward, I know that the defendant would plead in bar, that he had been formerly convicted or formerly acquitted; and the production of the record alone would protect him; but if the title of the book is not to be recited, the record will not be conclusive, and a second prosecution may take place. For the second indictment, compared with the present record, will contain no internal evidence, that the traverser had been formerly tried for the same offense, but he must resort to oral testimony, to prove that this book had been given in evidence against him at a former trial; and he might not be able to procure witnesses, whose testimony would be sufficient to establish this point. These are the reasons which induce me to think that this book ought not to be admitted to go in evidence to support the charges in the indictment. This principle has a considerable operation in questions of a private property. In an action of debt, if a bond or writing be the ground of the action; if there be the most minute variance between the bond or writing stated in the declaration, and that which is adduced in evidence in support of it, the party must suffer a nonsuit. If this precision and minute attention to accuracy be required in actions of property between man and man, is it not infinitely more important that the same principles should govern in criminal cases? If the argument be good in one case, it appears to be irresistible and omnipotent in the other.

JUDGE CHASE requested Mr. Hay to point out these parts of the authorities referred to, on which he relied to establish his doctrine.

Mr. Hay. If the court will have a little patience I will find the places.

JUDGE CHASE. I will have a great deal.

Mr. Hay. The authorities I rely on are, Hawkins' Pleas of the Crown and Salkeld's Reports, page 660. In this last book it is adjudged that when an indictment uses the words *"secundum tenorem et effectum,"* it binds the prosecutor to a literal recital; and any the least variance between the charge in the indictment and evidence offered to support it is fatal. The case I here refer to was an information for a libel: "In which libel were contained divers libellous matters *secundum tenorem et effectum,* and in setting forth a sentence of the libel, it was recited with the word 'nor' instead of the word 'not,' but the sense was not altered thereby. The defendant pleaded not guilty, and this appearing upon evidence, a special verdict was found, and the court held that the word tenor, imports, a true copy, and that the variance was fatal; for 'not' and 'nor' are different; different grammar, and different in sense; and Powys' Justice held as to the point where literal omissions, etc., would be fatal; that where a letter omitted or changed makes another word, it is a fatal variance; otherwise where the word continues the same; and in the principal case no man would swear this to be a literal copy."

It appears from well established authorities that the words "in manner and form following," do not bind the prosecutor to recite exactly, but the word "tenor" hath so strict a technical meaning, that it binds him to a literal copy.

These principles certainly apply to the case before the court. The words "tenor and effect following" are stated, and the evidence is variant.

JUDGE CHASE. You are certainly mistaken in your statement of the law, as applied to the case now before the court. In the cases you mention there is really a variance between the indictment and the evidence. Your objection is, that there is a variance between the thing charged in the indictment and the writing offered in evidence. But this case is very different; there is no variance. To ascertain this point I will state the indictment, and compare it with the law on which the prosecution is founded. The indictment charges, that the traverser, "maliciously intending to defame the

President of the United States, and to bring him into contempt and disrepute, and to excite the hatred of the good people of the United States against him, did wickedly and maliciously write, print, utter and publish, a false, scandalous and malicious writing, against the President of the United States, of the tenor and effect following, that is to say: 'The reign of Mr. Adams has hitherto been one continued tempest, etc.' Now what is the law? The act of Congress provides among other things that, 'if any person shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered or published, any false, scandalous and malicious writing or writings, against the government, or either House of the Congress, or the President of the United States, with intent to defame the said government, or either House of Congress, or the said President, or to bring them, or either or any of them, into contempt or disrepute, or to excite against them the hatred of the good people of the United States, etc.'" The indictment charges the defendant with publishing a false, scandalous and malicious writing against the President, and the law provides against the publication of false, scandalous and malicious writings against the President. The offenses stated in the indictment correspond with those expressed in the law; the question then is, whether the name of the book in which such false, scandalous and malicious writings are published, must be recited in an indictment against an offender? It brings it to this point. Is it necessary that the title of the publication should be examined before it can be ascertained that it comes within the law? Any false, scandalous and malicious writing published with intent to defame, is provided against by law, whatever may be its title or name, or whether it have any name or not. I know that cases can be produced where the title of the libel is recited in the indictment. I remember one case where a man was indicted for publishing a libel called "The Nun in her Smock;" but it was not necessary to mention the title of the libel in that case, nor is it essential in any. Why is it necessary that every charge against a

defendant should be explicit? It is that he may clearly comprehend it, and be prepared to make his defense. It is not necessary for this purpose to recite the name of the libel. The charge against the traverser is very explicit, and he well understands and is prepared to defend it; but it is no censure on his counsel that they urge this argument in his favor. You argue further, on a supposition, that if a subsequent prosecution were to be instituted for the same offense, the verdict and judgment now to be rendered could not be pleaded in bar. It requires very little legal ability to demonstrate that the title need not be recited; and it is equally easy to prove that the decision in this case may be pleaded in bar of any other prosecution for the same offense. The attorney for the United States must prove that the traverser did publish a false, scandalous and malicious writing, with intent to defame the President. This can be done without reciting the title; and if he supports by the evidence any entire charge—if he proves that the traverser did publish any false, scandalous and malicious writing, it will be sufficient to support the indictment as to that charge, but he must be acquitted of the other charges: and the charges of which he may be found guilty, can be easily compared to charges in any subsequent indictment. This is quite different from the cases where there is an actual variance between the paper charged, and the paper offered in evidence. I understand that difference to be, that where the prosecutor undertakes to say that certain precise words have been published, he must establish them; but when he states words of the tenor and effect following, he will only be obliged to prove the substance;* but you insist that the whole original, including the

* This position, notwithstanding the boisterous way in which it is laid down, is incorrect. There must be always at common law an exact recital of the alleged libellous matter, unless in the indictment itself the pleader excuses himself from so doing on the ground of the destruction of the instrument, or its possession by the defendant. See the authorities collected in Wharton's Prec. of Indict., 545. "Tenor and effect" exacts a literal recital. Ford v. Bennett, 1 Ld., Ray, 415. R. v. Bear, 2 Salk., 417. At the same time, Mr. Hay's position, that the title must be set out, is not sustained by the au-

title, must be copied in the indictment *verbatim et literatim*. I wonder you did not add *et punctuatim* also. There is no real variance, and there is an end of the objection. You are mistaken. I pronounce this to be the law, and I shall instruct the jury, that they may find the traverser guilty of part of the charges, and acquit him of such as are not proved.

It is not necessary for the attorney for the United States to make any reply, as there is no good reason to exclude the book; all that is necessary to be done on the part of the United States is to prove the charges to be true, and the book called "The Prospect Before Us" is good evidence to support it.[b]

thorities, though it is clear that in knocking it down, Judge Chase knocked down nearly the whole law of libels besides. Wharton's note to the report of the trial.

[b] Extracts from the pamphlet called "The Prospect Before Us," to show the calumnies of President Washington, by James Thompson Callender.

Page 10. "I now return to the tremor of 1787, by which the 'government of your own choice,' the federal constitution, was crammed down the gullet of America."

Page 15. "They (meaning the Georgia delegates in the convention) did not foresee the Washington plan of defending, or rather of deserting, the southwestern frontier."

Page 16. "By his own account, therefore, Mr. Washington has been twice a traitor. He first renounced the king of England, and thereafter the old confederation."

Page 17. "The following instance, out of many, shows in what manner Mr. Washington transacted business. On a question that was to come before the cabinet, he previously asked the opinion of Mr. Jefferson, and after hearing it, observed, that his own sentiments had been the same. When the council met, Hamilton and Knox voted, as usual, upon one side, and Jefferson on the other.

"'Gentlemen, I leave it to yourselves,' were the words of Mr. Washington; and the point was carried by the majority. The extravagant popularity possessed by this citizen reflects the utmost ridicule on the discernment of America. He approved of the funding system, the assumption, the national bank, and in contradiction to his own solemn promise (at Newburgh, March 15th, 1783), he authorized the robbery and ruin of the remnants of his own army."

Page 18. "In the fall of 1796, when the French began their depredations, the country fell into a more dangerous juncture than

Mr. Nelson. Although the paper is long and complicated, the testimony is not so. The testimony, as I stated to you before, is concise, plain, and correct. If there be a man who, now that he has heard that testimony, entertains a doubt

almost any which the old confederation ever endured. The tardiness and timidity of Mr. Washington were succeeded by the rancor and insolence of Adams."

Idem. "Under the old confederation, matters never were, nor could have been conducted so wretchedly as they actually are, and have been under the successive monarchs of Braintree and Mount Vernon."

Page 19. "It has been frequently asserted, and never denied," says Mr. Findley, "that the power of granting charters of incorporation, was repeatedly moved for in the federal convention, and especially the power of incorporating banks, but always rejected by a great majority." Mr. Washington was president of this federal convention. Of course he could not plead ignorance of its intention against the erection of a national bank. He swore to support the constitution. Directly after, he ratified the bank law, which drove the plough-share of paper-jobbing through the very midst of his double oath, as a federal citizen, and as a President."

Page 27. "For all this confusion and iniquity, we must thank Mr. Washington. He acted like a tenant, who quits the premises without giving notice to the landlord, that he may provide a successor."

Page 34. Note.—"If Washington wanted to corrupt the American judges, he could not have taken a more decisive step, than by the appointment of Jay."

Page 39. "His refusal must be resolved, therefore, into that utter want of feeling, which constitutes the key-stone of character; and which has cost the lives of so many hundreds of families, on the southwestern frontier."

Pages 39 and 40. "The wretched proclamation of neutrality, of April 22d, 1793, was most likely communicated to Pitt, long before it had been openly proposed in the cabinet of America. On the 8th of June following, the court of London issued the order for seizing neutral ships, bound to France with provisions. This was just forty-six days after the proclamation of Mr. Washington. Perhaps his manifesto had reached England before that order issued. At any rate, Pitt was undoubtedly acquainted with the President's abhorrence for the French revolution."

Page 99. "The proclamation of neutrality does not, therefore, deserve that title. It was a proclamation of ignorance and pusillanimity."

Page 41. "Mr. Washington had then only two things to do: The one to negotiate with the court of Lisbon, for the continuance of the

whether this libel was published by the traverser, it will be useless for me to address him; if there be a man who doubts on that point, his mind must be imperviable to the traits of truth; his mind must be panoplied o'er with doubt, scepti-

blockade. The other to redeem the prisoners, whose deliverance he had prevented some years before. On this occasion Mr. Washington displayed the same want of wisdom and economy, that marks almost every other part of his administration."

Pages 47 and 48. "The first wrong step of the President, with regard to the remittance of the tribute, was aggravated by every possible circumstance of impropriety. In direct breach of the constitution, he involved the United States in the additional expense of that frigate, without deigning to consult the legislature of his country. If such proceedings are suffered, it is evident that all civil government must soon be at an end. I am as solicitous as any man can be to think well of Mr. Washington, to believe, if possible, that he was misled by the bad people about him, and that he served his country with zeal, as far as his faculties and information would carry him."

Page 72. "Adams and Washington have since been shaping a series of these paper jobbers into judges and ambassadors. As their whole courage lies in want of shame, these poltroons, without risking a manly and intelligible defense of their own measures, raise an affected yelp against the corruption of the French directory; as if any corruption could be more venal, more notorious, more execrated than their own. For years together the United States resounded with curses against them, while the grand lama of federal adoration, the immaculate divinity of Mount Vernon approved of, and subscribed every one of their blackest measures."

Page 102. "This speech has a charm that completely unmasks the scandalous hypocrisy of Washington."

Idem. "Mr. Adams has only completed the scene of ignominy, which Mr. Washington began."

Page 103. "The expenses of each army were successively abstracted from the treasury by Mr. Washington, without the sanction of a statute, and in express breach of the constitution. Mr. Washington disdained to make an apology for this violation of his duty; and in both, congress were too mean to demand it. The charges of the recent tour to Northampton must have been obtained in the same way, because Congress were not in session when that affray broke out. This last presidential felony will be buried by Congress in the same criminal silence as its predecessors."

Extracts from a pamphlet called "The Prospect Before Us," to show the calumnies of President Adams, by James Thompson Callender.

1. "The reign of Mr. Adams has hitherto been one continued

cism and prejudice. If no doubt remain on this point, the question first in order to be examined is decided. Whether there be room for doubt, a summary review of the testimony will ascertain. Can there be a doubt—when all the witnesses have concurred in establishing this one point—that James Thompson Callender corrected the proof sheets? Can there be a doubt, when those who sold the copies of the book have all said that

tempest of malignant passions. As president he has never opened his lips nor lifted his pen without threatening or scolding. The grand object of his administration has been to exasperate the rage of contending parties, to caluminate and destroy every man who differs from his opinions. Mr. Adams has labored, and with melancholy success, to break up the bonds of social affection, and under the ruins of confidence and friendship, to extinguish the only beam of happiness, that glimmers through the dark and despicable farce of life."

2. "The contriver of this piece had been suddenly converted, as he said, to the presidential system, that is, to a French war, an American navy, a large standing army, an additional load of taxes and all other symptoms of debt and despotism."

3. "The same system of perfection has been extended all over the continent, every person holding an office must either quit it, or think and vote exactly with Mr. Adams."

4. "Adams and Washington have since been shaping a series of these paper-jobbers into judges and ambassadors. As their whole courage lies in want of shame; these poltroons without risking a manly and intelligible defense of their own measures, raise an affected yelp against the corruption of the French Directory, as if any corruption could be more venal, more notorious, more execrated than their own."

5. "The object with Mr. Adams was to recommend a French war, for the sake of supporting American commerce, but in reality for the sake of yoking us into an alliance with the British tyrant."

6. "While such members of the effective agents of the revolution languish in obscurity, or shiver in want, ask Mr. Adams, whether it was proper to heap so many myriads of dollars upon William Smith, upon a paper jobber, who next to Hamilton, and himself, is perhaps the most detestable character on the continent."

7. "You will then take your choice between innocence and guilt, between freedom and slavery, between paradise and perdition. You will chuse between the man, who has deserted and reversed all his principles, and that man whose own example strengthens all his laws; that man, whose predictions, like those of Henry, have been converted into history. You will chuse between that man, whose life is unspotted by a crime, and that man whose hands are reeking

they sold them for his benefit, and that he received the money? When it has been proved that he received the money from one purchaser himself, and that he paid for printing part of it—that part of the manuscript is in his own handwriting—can there be any doubt? And when, in addition to this, one witness declares that he knew him to be a

with the blood of the poor, friendless Connecticut sailor. I see the tear of indignation starting on your cheeks. You anticipate the name of John Adams."

8. "Every feature in the conduct of Mr. Adams, forms a distinct and additional evidence, that he was determined at all events to embroil this country with France."

9. "Mr. Adams has only completed the scene of ignominy which Mr. Washington began."

10. "This last presidential felony will be buried by Congress in the same criminal silence as its predecessors."

11. "Foremost in whatever is detestable, Mr. Adams feels anxiety to curb the frontier population."

12. "He was a professed aristocrat—he had proved faithful and serviceable to the British interest."

13. "Thus we see the genuine character of the President, when in but a secondary station, he censured the funding system; when at the head of affairs, he reverses all his former principles—he exerts himself to plunge his country into the most expensive and ruinous establishments. In the two first years of his presidency, he has contrived pretenses to double the annual expense of government, by useless fleets, armies, finecures and jobs of every possible description."

14. "By sending these ambassadors to Paris, Mr. Adams and his British faction designed to do nothing but mischief."

15. "In that paper, with all the cowardly intolerance arising from his assurance of personal safety, with all the fury, but without the propriety of sublimity of Homer's Achilles, this hoary headed incendiary, this libeller of the governor of Virginia, bawls out, to arms! then to arms! It was floating upon the same bladder of popularity, that Mr. Adams threatened to make this city the centrical point of a bonfire."

16. "Reader! dost thou envy that unfortunate old man, with his twenty-five thousand dollars a year, with the petty parade of his birthday, with the importance of his name sticking in every other page of the statute book. Alas! he is not an object of envy, but of compassion and horror. With Connecticut more than half undeceived, with Pennsylvania disgusted, with Virginia alarmed, with Kentucky holding him in defiance, having renounced all his original principles, and affronted all his honest friends, he cannot enjoy the sweet slumbers of innocence; he cannot hope to feel the

joint publisher with himself, and another witness declared, that he explained the meaning of a certain term, supposed to be ambiguous in its application, is it possible to entertain any doubt? Thus stands the evidence as to the publication. It will be proper for me, gentlemen of the jury, to state to you what is a publication in point of law, as to writing or printing. That the direct or indirect circulation or emission of a libel, is a publication thereof, in law and in fact, has never been questioned in a court of law. If it appears to you that James Thompson Callender did not directly or indirectly emit or circulate this paper, then is he not the publisher thereof; if he be not the publisher directly nor indirectly thereof, then ought he to be acquitted; and if he be the publisher, and the intention thereof be not criminal, that is, if the matter therein contained be not false, scandalous and malicious, still ought he to be acquitted; but if he be the publisher, and the matter be libellous, that is, false, scandalous and malicious, the intention must be wicked and criminal, and you must find him guilty. For the questions you are to try, gentlemen of the jury, are: Was this paper published by the traverser? Was the intention criminal? that is, is the matter false, scandalous and malicious? the evidence which you have heard ascertains the first question, and an examination of the paper, or such parts of it as are laid in the indictment,

most exquisitely delightful sensation that ever warmed a human breast, the consciousness of being universally and deservedly beloved."

17. "It is happy for Mr. Adams himself, as well as for his country, that he asserted an untruth."

18. "In the midst of such a scene of profligacy and of usury, the President has persisted as long as he durst, in making his utmost efforts for provoking a French war."

19. "For although Mr. Adams were to make a treaty with France, yet such is the grossness of his prejudice, and so great is the violence of his passions, that under his administration America would be in constant danger of a second quarrel."

20. "When a chief magistrate is both in his speeches and in his newspapers, constantly reviling France, he can neither expect nor desire to live long in peace with her. Take your choice then between Adams, war and beggary, and Jefferson, peace and competency."

will decide the second question. Whether your hearts are at ease—whether your passions are untouched — whether your feelings are unaffected, now that you have fully heard the charge, you best know. It remains only now for me, gentlemen of the jury, to call upon you, in the name of your country, whose interest you are to defend whilst you protect the rights of the individual. I call upon you in the name of your God, a portion of whose justice you are about to administer, and on your oaths, uninfluenced by favor, partiality, prejudice or affection, to discharge your duty to your God, to your country, and to yourselves.

I have told you, and again repeat, that it is the peculiar privilege of every citizen of this happy country to place confidence in whom he pleases, and at the constitutional periods of making new elections, to withdraw his confidence from a former representative, and place his trust in another; and even expatiate on the virtues of the new candidate; but this does not warrant him to vilify, revile, and defame another individual, who is a candidate. Cannot a good thing be said of one individual without saying black and damnable things of another? Is it necessary, in order to recommend one man to the presidential office, that you should charge another with bringing on his country war and beggary? The whole forms a perfect chain of malice, falsehood, and slander.

Thus have I made, gentlemen of the jury, a calm, uncolored statement of facts. I have not highly varnished, nor have said anything but what is consistent with truth. What impression the evidence or charge may have made on your minds, whether your feelings be affected, you and each of you know best. It remains only now for me, gentlemen of the jury, to remind you, that you are not only to protect the interests of your country, but to defend the rights of that individual; and in the name of God and of your country, I call upon you to discharge your duty to both and to yourselves.

Mr. Hay called Colonel John Taylor (of Caroline county) as a witness, and he was sworn.

JUDGE CHASE. I desire to know what you intend to prove by the witness.

Mr. Hay. We intend to examine Colonel Taylor to prove that he had avowed principles in his presence which justified Mr. Callender in saying that the President was an aristocrat; that he had voted against the sequestration law, and the resolutions concerning the suspension of commercial intercourse with Great Britain, by which he defeated every effort of those who were in favor of those beneficial measures which were well calculated to promote the happiness of their country.

JUDGE CHASE. You must give me a statement in writing of the questions you intend to be put to the witness.

Mr. Nicholas. The traverser is at least entitled to every indulgence which had been shown to the attorney for the United States; this requisition had not been made of the attorney, when he introduced witnesses on behalf of the United States, nor was it according to the practice of the State courts. I wish the witness to state all he knew that would apply to the defense of our client. I do not know what the witness would precisely prove, but if the court insist upon it, I would furnish a statement of the questions which I should first propound, but request that I may not be considered as confined, in the examination of the witness, to the questions so stated.

JUDGE CHASE. It is right to state the questions intended to be propounded to witnesses, in all cases, and the reason is extremely plain. Juries are only to hear legal evidence, and the court are the only judges of what is or is not legal evidence, to support the issue joined between the parties. To say that you will correct improper evidence, after it shall have been given, is improper, because illegal evidence, once heard, may make an undue impression, and, therefore, ought not to be heard at all by the jury; and the attorney for the United States had, in opening the cause, stated the purpose for which he introduced the witnesses.

JUDGE CHASE, having received a statement of the ques-

tions meant to be put,* and which were propounded by *Mr. Nicholas,* declared Colonel Taylor's evidence to be inadmissible. No evidence, he said, is admissible that does not justify the whole charge. The charge you mean to justify by this witness, as I understand you, is, that the President is a professed aristocrat, and that he has proved serviceable to the British interest. You must prove both these points, or you prove nothing. Now as you do not attempt to prove the whole of one specific charge, but only a part of it, your evidence cannot be received; this is the law, both in civil and criminal cases; he who justifies, must justify an entire charge, or else his defense does not amount to a justification in law. You have not proved the truth of any particular charge, though in order to excuse it, you must prove the whole; to prove the truth of a part only, is not proving what is material. The attorney proposed to prove his indictment. He has exhibited his oral and written testimony to prove it. The traverser excuses himself from the imputed guilt, by averring that part of some of the charges is true. Is this evidence proper when the whole charge is in issue? If it be, the proof of a very trivial part of an important indictment would excuse from the whole; but I pronounce the law to be otherwise, and take the responsibility on myself, and risk my character on it. It may be said that this will preclude the party from the privilege of his testimony; but this will only be a misrepresentation, it precludes them from no legal benefit. My country has made me a judge, and you must be governed now by my opinion, though I may be mistaken; but if I am not right, it is an error in judgment, and you can state the proceedings on the record so as to show any error, and I shall be the first man to grant you the benefit of a new trial by

* Ques. 1st. Did you ever hear Mr. Adams express any opinion favorable to monarchy and aristocracy; and what were they?

Ques. 2d. Did you ever hear Mr. Adams, whilst Vice-President, express his disapprobation of the funding system?

Ques. 3d. Do you know whether Mr. Adams did not, in the year 1794, vote against the sequestration law, and the bill for suspending commercial intercourse with Great Britain?

granting you a writ of error in the Supreme Court. It is on these grounds that I reject the evidence of the gentleman. The very argument assigned by the young gentleman who spoke last, has convinced my mind that I am right. The offered testimony has no direct and proper application to the issue; it would deceive and mislead the jury; an argumentative justification of a trivial, unimportant part of a libel, would be urged before a jury as a substantial vindication of the whole. You would, by misleading the jury under such illegal testimony destroy public treaties and public faith; and nothing would be more uncertain than law, were such an illegal excuse admitted in courts of law.

Mr. Nicholas suggested that it might be proper to prove one part of a specific charge by one witness, and another part by another, and thereby prove the charge.

JUDGE CHASE said that the very argument suggested by the young gentleman who spoke last, convinced his mind that it would be improper to admit the testimony now offered to the court; that to admit evidence, which went to an argumentative establishment of the truth of a minute part of the charge by one witness, and another minute part by another witness, would be irregular, and subversive of every principle of law; that it had no relation to the issue; that it was a popular argument, calculated to deceive the people, but very incorrect.

JUDGE GRIFFIN declared that he concurred with his brother judge.

JUDGE CHASE. This is a new doctrine, inculcated in Virginia. You have all along mistaken the law, and press your mistakes on the court. The United States must prove the publication, and the fallacy of it. When these things are done, you must prove a justification, and this justification must be entire and complete, as to any one specific charge; a partial justification is inadmissible. I am happy to find that my brother Judge Griffin concurs with me in opinion.

Mr. Hay. The question before the court is, whether this evidence goes to prove the truth of the whole charge? The

opinion given by the court I understand to be, that evidence cannot be produced by the traverser to prove the truth of a part of a charge; but if evidence could be adduced to prove the whole, then such evidence would be admissible. One specific charge is twofold; that the President is an aristocrat; and that he proved serviceable to the British interest. The evidence, we suppose, will support this charge; we wish to prove the truth of the whole charge if we can, though I do not know that it is in our power. The evidence, we have reason to believe, goes first to prove that he is an aristocrat, and secondly, that he did prove serviceable to the British interest; if the testimony will in fact prove these two points, whatever may be the opinion of the court, I do not hesitate to say that, in my estimation, it will fully excuse and justify the traverser; if we can prove that the President has avowed aristocratical sentiments in conversation, and that he did in reality prove faithful and serviceable to the British interest, the traverser must be acquitted of this charge. As to the first part I can prove by the words of Mr. Adams, published by himself, in his book called a Defense of the American Constitution, that he thinks a government of three parts, a king, lords and commons, the best in the world. Suppose, in addition to this, it could be proved that a law passed the House of Representatives of the United States, to sequester British property; and suppose that one-half the Senate of the United States were in favor of it; and that the policy of passing the law was advocated by the best and wisest men in this country, who have the same pretensions to patriotism and virtue that Mr. Adams has, but that its passage was prevented by the casting vote of Mr. Adams as speaker of the Senate, would not the traverser be justified as to this charge? Would it not demonstrate that he proved serviceable to the British interest? By the answers to the first and third questions we expect to prove both these points.

Mr. Nelson objected to the introduction of such testimony, as being altogether inadmissible; that gentlemen ought to reflect that, if such evidence as this was to be received, any

other testimony, however irregular or improper, might also be admitted; and, particularly, that it would be a departure from the universal principle of law, which required the production of the best testimony which the nature of every case admitted, and that the journals and records of Congress were the best evidence of what votes had been given on any subject discussed before that body.

JUDGE CHASE. *Mr. Nelson*: Being very much pressed by the young gentlemen who defend the traverser, to admit this testimony, I was going to recommend to you to permit those questions to be put to the witness, though they are certainly irregular. I wish you could consent that they should be propounded.

Mr. Nelson declared that he did not feel himself at liberty to consent to such a departure from legal principles.

Mr. Wirt. Gentlemen of the jury: I premise that the situation of the defendant and his counsel is extremely embarrassing; as Mr. Callender had been presented, indicted, arrested and tried, during this term, I have not been able to procure the testimony essential to his defense, nor are his counsel prepared to defend him. The conduct of the court was apparently precipitate, in not postponing the trial until the next term.

JUDGE CHASE told him he must not reflect on the court.

Mr. Wirt said, that his object was not to reflect on the court, but to apologize to the jury for the weakness of a defense which he was about to make.

JUDGE CHASE, after observing that his apology included the very reflection he denied, told him to proceed in his cause.

Mr. Wirt. Gentlemen of the jury: I am prevented from explaining to you the causes which have conspired to weaken our defense, and it is no doubt right that I should be prevented, as the court have so decided: permit me, then, gentlemen, to pass on abruptly to the law, under which we are indicted. You will find that a material part of your inquiry will relate to the powers of a jury over the subject committed

to them, whether they have the right to determine the law, as well as the fact. In Virginia, an act of the assembly has adopted the common law of England; that common law, therefore, possesses in this state all the energy of a legislative act. By an act of Congress, the rules of proceedings in the Federal courts in the several states, are directed to conform to the rules of the states in which such court may be in session; by that act of Congress, it is therefore provided, that the practice of the courts of Virginia shall be observed in this court. To ascertain your powers, therefore, as a jury, we have only to refer to the common law of England, which has been adopted in the laws of this state, and which defines the powers of juries in the state courts. By the common law of England, juries possess the power of considering and deciding the law as well as the fact, in every case which may come before them. I have no doubt but I shall receive the correction of the court, if I am wrong in these positions. If, then, a jury in a court of the state would have a right to decide the law and the fact, so have you. The Federal Constitution is the supreme law of the land; and a right to consider the law, is a right to consider the Constitution. If the law of Congress under which we are indicted, be an infraction of the Constitution, it has not the force of a law, and if you were to find the traverser guilty, under such an act, you would violate your oaths.

JUDGE CHASE. Take your seat, sir, if you please. If I understand you rightly, you offer an argument to the petit jury, to convince them that the statute of Congress, entitled, "An act, etc.," commonly called the Sedition Law, is contrary to the Constitution of the United States, and, therefore, void. Now I tell you that this is irregular and inadmissible; it is not competent to the jury to decide on this point; but if you address yourselves, gentlemen, to the court, they will with pleasure hear any reasons you may offer, to show that the jury have the right contended for. Since I came into the commonwealth, I understood that this question would be stirred, and that the power of a jury to determine the validity

or nullity of a law would be urged. I have, therefore, deliberately considered the subject, and I am ready to explain my reasons for concluding that the petit jury have not a right to decide on the constitutionality of a law, and that such a power would be extremely dangerous. Hear my words: I wish the world to know them—my opinion is the result of mature reflection.

[Here the JUDGE then read part of a long opinion, to show that the jury had not the right contended for; after which, he told the counsel for the traverser that he would hear with pleasure any arguments which could be urged to show that he was mistaken.]

Mr. Wirt. I shall state to the court, in a few words, the reasons which have induced me to ascribe this right to the jury. They are sworn to give their verdict according to the evidence, and the law is evidence; if the jury have no right to consider the law, how is it possible for them to render a general verdict? Suppose, for example, an indictment for murder—how can the jury pronounce a verdict of guilty, or not guilty, if they have not the right as well of ascertaining whether the facts have been committed, as whether they amount to a breach of law? This doctrine is too clearly established to require the aid of authorities.

JUDGE CHASE. No man will deny your law—we all know that juries have the right to decide the law, as well as the fact—and the Constitution is the supreme law of the land, which controls all laws which are repugnant to it.

Mr. Wirt. Since, then, the jury have a right to consider the law, and since the constitution is law, the conclusion is certainly syllogistic, that the jury have a right to consider the Constitution.

JUDGE CHASE. A *non sequiter,* sir.

Mr. Nicholas. I am so much under the influence of duty that, though I am in the same situation with the gentleman who preceded me, and though the court seem to be impressed with the opinion, that the jury have no right to determine on the constitutionality of an act of Congress, yet, arduous

as the task may be, I shall offer a few observations to show that they have this right. I intend to defend Mr. Callender by the establishment of two points.

First, that a law contrary to the Constitution is void; and, secondly, that the jury have a right to consider the law and the fact. First, it seems to be admitted on all hands, that, when the legislature exercise a power not given them by the Constitution, the judiciary will disregard their acts. The second point, that the jury have a right to decide the law and the fact, appears to me equally clear. In the exercise of the power of determining law and fact, a jury cannot be controlled by the court. The court have a right to instruct the jury, but the jury have a right to act as they think right; and if they find contrary to the directions of the court, and to the law of the case, the court may set aside their verdict and grant a new trial.

JUDGE CHASE. Courts do not claim the right of setting aside the verdict in criminal cases.

Mr. Nicholas. From this right of the jury to consider law and fact in a general verdict, it seems to follow, that counsel ought to be permitted to address a jury on the constitutionality of the law in question; this leads me back to my first position, that if an act of Congress contravene the Constitution of the United States, a jury have a right to say that it is null, and that they will not give the efficacy of a law to an act which is void in itself; believing it to be contrary to the Constitution, they will not convict any man of a violation of it. If this jury believed that the Sedition Act is not a law of the land, they cannot find the defendant guilty. The Constitution secures to every man a fair and impartial trial by jury, in the district where the fact shall have been committed: and to preserve this sacred right unimpaired, it should never be interfered with. If ever a precedent is established, that the court can control the jury so as to prevent them from finding a general verdict, their important right, without which every other right is of no value, will be impaired, if not absolutely destroyed. Juries are to decide ac-

cording to the dictates of conscience and the laws of the country, and to control them would endanger the right of this most invaluable mode of trial.

I have understood that some reliance would be placed on two decisions of the courts of this State, in which they determined two acts of our legislature to be unconstitutional; but when we come to analyze these decisions, they will not authorize the belief that the jury have not the right I contend for—they only prove that the judiciary can declare legislative acts to be unconstitutional; they do not prove that a jury may not have a similar power. In the case of Kamper v. Hawkins, they refused to carry into effect a law which gave the district courts a right to grant injunctions in certain cases, because they thought it unconstitutional, and that the courts had no power to act under the law. That case did not turn on a relative view of the power and connection of a court and jury; it was a question whether the courts would exercise a particular jurisdiction, and carry into effect that act as practiced by the judges in chancery; but they never decided that a jury had not a right to determine on the constitutionality of a law, nor could a question about this right have arisen in those two cases; the court said that the judiciary were not bound to carry into effect an unconstitutional law. I do not deny the right of the court to determine the law, but I deny the right of the court to control the jury; though I have not bestowed a very particular attention on this subject, I am perfectly convinced that the jury have the right I contend for; and, consequently, that counsel have a right to address them on that subject.

The act of Congress to which I have alluded, appears to have given to the jury the power of deciding on the law and the fact; and I trust, that when this whole question comes into consideration, the court will suffer the counsel for the traverser to go on to speak to the jury, subject to the direction of the court.

Mr. Hay observed that he was prepared to address the court on the extent of the powers of the jury in the case at

bar. The arguments, your Honor, which I shall urge, I shall address to the court, not wishing to be heard by the jury, or to be attended to by the numerous auditory now present. A question of great importance depends on this decision; much of the public happiness, of the public peace, of the public liberty, depends on the final decision which shall be pronounced on this subject. I entertained doubts at first; but a calm and dispassionate inquiry, and the most temperate investigation and reflection, have led me to believe and to say, that the jury have a right to determine every question which is necessary to determine, before sentence can be pronounced upon the traverser. I contend that the jury have a right to determine whether the writing charged in the indictment to be false, scandalous and malicious, be a libel or not. If this question should be decided in the affirmative by the court, I shall endeavor to convince the jury that it is not a libel, because there is no law in force, under the government of the United States, which defines what a libel is, or prescribes its punishment. It is a universal principle of law, that questions of law belong to the court, and that the decision of facts belongs to the jury; but a jury have a right to determine both law and fact in all cases.

JUDGE CHASE asked *Mr. Hay* whether he meant to extend his proposition to civil as well as criminal cases, and told him that if he did, the law was clearly otherwise.

Mr. Hay said he thought the proposition universally true, but it was only necessary for him to prove it to be true in cases of a criminal nature.

JUDGE CHASE again interrupted *Mr. Hay,* and briefly expressed his opinion of the law. *Mr. Hay* folded up and put away his papers, seeming to decline any further argument.

JUDGE CHASE requested him to continue his argument, and added: "Please to proceed, and be assured that you will not be interrupted by me, say what you will."

Mr. Hay refused to proceed.

JUDGE CHASE observed, that though he thought it his duty to stop the counsel when mistaking the law, yet he did not

wish to interrupt them improperly; that there was no occasion to be captious; and concluded thus, "Act as you please, sir."

JUDGE CHASE. I will assign my reasons why I will not permit the counsel for the traverser to offer arguments to the jury, to urge them to do what the Constitution and law of this country will not permit; and which, if I should allow, I should, in my judgment, violate my duty, disregard the Constitution and law, and surrender up the judicial power of the United States, that is, the power intrusted by the Constitution to the Federal courts, to a petit jury, in direct breach of my oath of office.

The indictment charges that the traverser, on the 1st day of February, 1800, designing and intending to defame the President of the United States, and to bring him into contempt and disrepute, and to excite the hatred of the good people of the United States against him, did wickedly and maliciously write, print, utter and publish (or did cause or procure to be printed and published), a false, scandalous and malicious writing, against the said President of the United States, of the tenor and effect stated in the indictment. On examining the indictment, it appears, that twenty separate and distinct sets of words are set forth therein, as allegations or charges against the traverser. He has plead "not guilty" to all of them.

To support this indictment on behalf of the government of the United States, it must be proved to the jury; first, that the traverser did write, print, utter or publish, or did cause or procure to be printed or published, a false and scandalous writing against the President of the United States; secondly, that the said writing is false, scandalous and malicious; and thirdly, that it was published with intent to defame the President, etc., as stated in the statute and charged in the indictment.

If these three facts shall be established to the satisfaction of the jury, they must find the traverser guilty, generally, unless he can prove to them the truth of the matter con-

tained in the publication, in which case, the statute on which the traverser is indicted excuses him. If all the twenty sets of words, stated in the indictment as charges against the traverser, shall not be proved against him; or if he can prove that any of them are true, the jury will acquit him of such of them as shall not be established against him, and also of such of them as he can prove to be true; and they will find him guilty of the residue.

These inquiries, on behalf of the government of the United States, and on the part of the traverser, are proper for, and within the jurisdiction and the terms of the oath of the petit jury, who have been sworn "that they will well and truly try the issue joined between the United States and the traverser at the bar, and a true verdict give according to their evidence." The issue joined, therefore, is, whether the traverser is guilty of the several offenses charged in the indictment; and to this issue no evidence is admissible (on the part of the government, or of the traverser) but what is pertinent or applicable to it. The petit jury, to discharge their duty, must first inquire, whether the traverser committed all or any of the facts alleged in the indictment to have been done by him, some time before the indictment. If they find that he did commit all or any of the said facts, their next inquiry is, whether the doing such facts have been made criminal and punishable by the statute of the United States, on which the traverser is indicted. For this purpose, they must peruse the statute, and carefully examine whether the facts charged and proved are within the provisions of it. If the words that create the offense are plain and intelligible, they must then determine whether the offense proved is of the species of criminality charged in the indictment; but if the words are ambiguous or doubtful, all construction should be rejected. The statute, on which the traverser is indicted, enacts "that the jury who shall try the cause shall have a right to determine the law and the fact, under the direction of the court, as in other cases." By this provision, I understand that a right is given to the jury to determine what the law

is in the case before them; and not to decide whether a statute of the United States produced to them, is a law or not, or whether it is void, under an opinion that it is unconstitutional, that is, contrary to the Constitution of the United States. I admit that the jury are to compare the statute with the facts proved, and then to decide whether the acts done are prohibited by the law; and whether they amount to the offense described in the indictment. This power the jury necessarily possesses, in order to enable them to decide on the guilt or innocence of the person accused. It is one thing to decide what the law is, on the facts proved, and another and a very different thing, to determine that the statute produced is no law. To decide what the law is on the facts, is an admission that the law exists. If there be no law in the case, there can be no comparison between it and the facts; and it is unnecessary to establish facts before it is ascertained that there is a law to punish the commission of them.

The existence of the law is a previous inquiry, and the inquiry into facts is altogether unnecessary, if there is no law to which the facts can apply. By this right to decide what the law is in any case arising under the statute, I cannot conceive that a right is given to the petit jury to determine whether the statute (under which they claim this right) is constitutional or not. To determine the validity of the statute, the Constitution of the United States must necessarily be resorted to and considered, and its provisions inquired into. It must be determined whether the statute alleged to be void, because contrary to the Constitution, is prohibited by it expressly, or by necessary implication. Was it ever intended, by the framers of the Constitution, or by the people of America, that it should ever be submitted to the examination of a jury, to decide what restrictions are expressly or impliedly imposed by it on the national legislature? I cannot possibly believe that Congress intended, by the statute, to grant a right to a petit jury to declare a statute void. The man who maintains this position must have a most contemptible opinion of the understanding of that body; but I believe the defect lies with himself.

If any one can be so weak in intellect as to entertain this opinion of Congress, he must give up the exercise of the power, when he is informed that Congress had no authority to vest it in any body whatsoever; because, by the Constitution (as I will hereafter show), this right is expressly granted to the judicial power of the United States, and is recognized by Congress by a perpetual statute. If the statute should be held void by a jury, it would seem that they could not claim a right to such decision under an act that they themselves consider as mere waste paper. Their right must, therefore, be derived from some other source.

It appears to me that all the rights, powers, and duties of the petit jury sworn in this cause, can only be derived from the Constitution, or statutes of the United States made agreeably to it; or from some statute of this commonwealth not contrary to the Federal Constitution or statutes of Congress; or from the common law, which was adopted by the Federal Constitution in the case of trials by jury in criminal cases.

It never was pretended, as I ever heard, before this time, that a petit jury in England (from whence our common law is derived), or in any part of the United States ever exercised such power. If a petit jury can rightfully exercise this power over one statute of Congress, they must have an equal right and power over any other statute, and indeed over all the statutes; for no line can be drawn, no restriction imposed on the exercise of such power; it must rest in discretion only.

If this power be once admitted, petit jurors will be superior to the national legislature, and its laws will be subject to their control. The power to abrogate or to make laws nugatory, is equal to the authority of making them. The evident consequences of this right in juries will be, that a law of Congress will be in operation in one state and not in another. A law to impose taxes will be obeyed in one state, and not in another, unless force be employed to compel submission.

The doing certain acts will be held criminal, and punished in one state, and similar acts may be held innocent, and even approved and applauded in another.

The effects of the exercise of this power by petit jurors may be readily conceived. It appears to me that the right now claimed has a direct tendency to dissolve the Union of the United States, on which, under Divine Providence, our political safety, happiness and prosperity depend.

No citizen of knowledge and information, unless under the influence of passion or prejudice, will believe, without very strong and indubitable proof, that Congress will, intentionally, make any law in violation of the Federal Constitution, and their sacred trust. I admit that the Constitution contemplates that Congress may, from inattention or error in judgment, pass a law prohibited by the Constitution; and, therefore, it has provided a peaceable, safe and adequate remedy. If such a case should happen, the mode of redress is pointed out in the Constitution, and no other mode can be adopted without a manifest infraction of it.

Every man must admit that the power of deciding the constitutionality of any law of the United States, or of any particular state, is one of the greatest and most important powers the people could grant.

Such power is restrictive of the legislative power of the Union, and also of the several states; not absolute and unlimited, but confined to such cases only where the law in question shall clearly appear to have been prohibited by the Federal Constitution, and not in any doubtful case. On referring to the ninth section of the first article of the Constitution, there may be seen many restrictions imposed on the powers of the national legislature, and also on the powers of the several state legislatures. Among the special exceptions to their authority, is the power to make *ex post facto* laws, to lay any capitation, or other direct tax, unless in proportion to the census; to lay any tax or duty on articles exported from any state, etc.

It should be remembered that the judicial power of the United States is co-existent, co-extensive, and co-ordinate with, and altogether independent of, the Federal legislature, or the executive. By the sixth article of the Constitution,

among other things, it is declared that the Constitution shall be the supreme law of the land. By the third article, it is established "that the judicial power of the United States shall be vested in one supreme court, and in such other inferior courts as Congress may from time to time ordain and establish; and that the judicial power shall extend to all cases in law and equity, arising under the Constitution and laws of the United States."

Among the cases which may arise under the Constitution, are all the restrictions on the authority of Congress, and of the state legislatures.

It is very clear, that the present case arises under the Constitution, and also under a law of the United States, and therefore it is the very case to which the Constitution declares the judicial powers of the United States shall extend.

It is incontrovertible that the Constitution is the supreme law, and therefore, it must be the rule by which the Federal and state judges are bound to regulate their decisions. By the sixth article of the Constitution, it is provided (among other things) that all members of Congress, and of the several state legislatures, and all judicial officers of the United States, and of the several states, shall be bound by an oath or affirmation to support the Constitution. By this provision, I understand that every person, so sworn or affirmed, promises that he will preserve the Constitution as established, and the distribution of powers thereby granted; and that he will not assent to any amendment or alteration thereof, but in the mode prescribed in the fifth article; and that he will not consent to any usurpation by any one branch of the legislature upon the other, or upon the Executive, or by the Executive upon either branch, or by any department or officer of government, of the power granted to another; or that the power granted to either shall be exercised by others.

I also understand by this engagement, that the person taking it, promises also that he will oppose by his example, argument, advice, and persuasion, and by all other means in his power, force only excepted, any design, advice or attempt to impair or destroy the Constitution.

If this exposition of this solemn obligation is substantially correct, I cannot believe that any person having the same understanding of it, will maintain that a petit jury can rightfully exercise the power granted by the Constitution to the Federal judiciary.

From these considerations I draw this conclusion, that the judicial power of the United States is the only proper and competent authority to decide whether any statute made by Congress (or any of the state legislatures) is contrary to, or in violation of, the Federal Constitution.

That this was the opinion of the Senate and House of Representatives, and of General Washington, then President of the United States, fully appears by the statute, entitled "An act to establish the judicial courts of the United States," made at the first session of the first Congress (on 24th September, 1789, chap. xx, sec. 8), which enacts, "that the justices of the Supreme Courts, and the district judges, shall take an oath or affirmation in the following words, to-wit:

"I, A. B., do solemnly swear or affirm, that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as such judge, according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States."

No position can be more clear than that all the Federal judges are bound by the solemn obligation of religion, to regulate their decisions agreeably to the Constitution of the United States, and that it is the standard of their determination in all cases that come before them.

I believe that it has been the general and prevailing opinion in all the Union, that the power now wished to be exercised by a jury, properly belonged to the Federal courts.

It was alleged that the tax on carriages was considered by the people of this commonweaith to be unconstitutional, and a case was made to submit the question to the Supreme Court

of the United States, and they decided that the statute was not unconstitutional, and their decision was acquiesced in.

I have seen a report of a case (Kamper v. Hawkins) decided in 1793, in the general court of this commonwealth, respecting the constitutionality of a law which gave the district courts a power of granting injunctions in certain cases, in which case the judges of the general court (four to one) determined that the law was unconstitutional and void. On yesterday I saw the record of another case, in the Court of Appeals of this commonwealth (in 1788), on which it appears that the general assembly passed "An act to establish district courts," and the judges (ten being present), adjudged "that the Constitution and the said act were in opposition, and could not exist together, and that the court ought not to do anything officially in the execution of an act, which appeared to be contrary to the spirit of the Constitution." I also observed, that the then governor, Mr. Edmund Randolph, immediately on this decision called the general assembly by proclamation; and I have been informed that they altered the law according to the opinion of the court.

From these two decisions, in the two highest courts of justice in this state, I may fairly conclude, that, at that period, it was thought that the courts of justice were the proper judicature to determine the constitutionality of the laws of this commonwealth. It is now contended, that the constitutionality of the laws of Congress should be submitted to the decision of a petit jury. May I ask, whence this change of opinion? I declare that the doctrine is entirely novel to me, and that I never heard of it before my arrival in this city. It appears to me to be not only new, but very absurd and dangerous, in direct opposition to, and a breach of the Constitution. And I wish those who maintain this doctrine, and have sworn to support the Constitution, conscientiously to reconsider their opinions with a calm and deliberate temper, and with minds disposed to find the truth, and to alter their opinion if convinced of their error.

It must be evident, that decisions in the district or circuit

courts of the United States will be uniform, or they will become so by the revision and correction of the Supreme Court; and thereby the same principles will pervade all the Union; but the opinions of petit juries will very probably be different in different states.

The decision of courts of justice will not be influenced by political and local principles, and prejudices. If inferior courts commit error, it may be rectified; but if juries make mistakes, there can be no revision or control over their verdicts, and therefore, there can be no mode to obtain uniformity in their decisions. Besides, petit juries are under no obligation by the terms of their oath, to decide the constitutionality of any law; their determination, therefore, will be extra judicial. I should also imagine, that no jury would wish to have a right to determine such great, important and difficult questions; and I hope no jury can be found, who will exercise the power desired over the statutes of Congress, against the opinion of the Federal courts.

I have consulted with my brother, Judge Griffin, and I now deliver the opinion of the court, "That the petit jury have no right to decide on the constitutionality of the statute on which the traverser is indicted; and that, if the jury should exercise that power, they would thereby usurp the authority entrusted by the Constitution of the United States to this court." Governed by this opinion, the court will not allow the counsel for the traverser to argue before the petit jury, that they have a right to decide on the constitutionality of the statute, on which the traverser stands indicted. If the counsel for the traverser had offered sufficient arguments to the court, to show that the petit jury had this right, the court, on being convinced that the opinion delivered was erroneous, would have changed it; for they hold it a much greater reproach for a judge to continue in his error, than to retract.

The gentlemen of the profession know, that questions have sometimes occurred in state courts, whether acts of assembly had expired, or had been repealed; but no one will say that such questions were ever submitted to a jury.

If the Constitution of the United States had not given to the judiciary a right to decide on the constitutionality of Federal laws—yet if such power could be exercised, it could not be by a juror, from this consideration—it is a maxim of law in all the states, that the courts have the exclusive right to decide every question, as to the admissibility of evidence in every case, civil or criminal, whether the evidence be by act of assembly, or by deed, or other writing, or by witnesses.

JUDGE CHASE concluded with observing, that, if he knew himself, the opinion he had delivered and the reasons offered in its support, flowed not from political motives, or reasons of state, with which he had no concern, and which he conceived never ought to enter courts of justice, but from a deliberate conviction of what the Constitution and the law of the land required. I hold myself equally bound to support the rights of the jury, as the rights of the court. I consider it of the greatest consequence to the administration of justice, that the powers of the court, and the powers of the petit jury, should be kept distinct and separate. I have uniformly delivered the opinion, "that the petit jury have a right to decide the law as well as the fact, in criminal cases;" but it never entered into my mind that they, therefore, had a right to determine the constitutionality of any statute of the United States. It is my duty to execute the laws of the United States with justice and impartiality, with firmness and decision, and I will endeavor to discharge this duty with the assistance of the Fountain of wisdom, and the Giver of all human reason and understanding.

THE VERDICT AND SENTENCE.

After two hours, the jury returned with a verdict of *guilty*, upon which the court sentenced the defendant to a fine of two hundred dollars, and an imprisonment of nine months.

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